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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL I.S.P. (N) CL—I

INTERMEDIATE COURSE (N)
COMPANY LAW
STUDY—I

Contents :

Lifting of the "corporate veil"—Classes of companies under the Act—Holding and subsidiary companies—Public financial institutions—Consequences of default in complying with the conditions constituting a private compony—Consequences of altering the conditions constituting a private company—Conversion of a public company into a private company—Privileges or exemptions—When companies must be registered—Mode of Registration—Memorandum of Association—Doctrine of ultra vires—Alteration of the Memorandum—Alteration of Objects—Significance of Articles of Association—Alteration of Articles—Doctrine of "Indoor Management—Contractual relationship between different parties formed on registration of Memorandum and Articles—Preliminary or pre-incorporation contracts—Promoters—Certificate of Incorporation—Commencement of business—Board—Company Law Administration.

Prescribed Readings :

1. *Lectures on Company Law* by S.M. Shah (Latest Edition),
2. *Indian Company Law* by Avtar Singh (Latest Edition).

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What is a company ? We so frequently hear about somebody either working in a company or running a company. For a lay man, the term "company" signifies a business organisation. But we know that all business organisations cannot be technically called 'companies'. For example, a person running a small shop, *etc.*, on his own, is termed as a sole proprietor. When two or more persons (but not more than 20) pool their money (technically known as capital) and carry on business together, we call them partners and the type of business they conduct is 'partnership'.

The ordinary law of the land does not let a sole proprietor to segregate his private means from those in his business. Consequently, in the case of a business crisis, his business debts will be met also from his private means. Thus some inevitable event of miscalculation may lead to the ruination of himself and his family. It may be not worthwhile for him to make such a stake and he may, therefore, decide upon carrying on the business as a private company. A partner's position is all the more precarious. The partnership relation is based on mutual confidence. If a partner misuses this confidence, he may land the other partner in insurmountable difficulties, since a partner's liability is unlimited. This risk the partners may eliminate by incorporating themselves into a company under the Companies Act since in that event the liability of each member becomes limited to the extent of the shares held by him. Apart from the limitation of individual risk there may be multifarious considerations which may impel a group of persons to form a corporate nucleus under the Act. *e.g.*, procurement of technical know-how, persons with proven managerial ability, huge capital, corporate personality, transferability of shares, *etc.*

When a company is registered, it is clothed with a legal personality. It comes to have almost the same rights and powers as human being. Its existence is distinct and separate from that of its members. Members may die or change, but the company goes on till it is wound up on the grounds specified by the Act. In other words, it means that it has a perpetual succession. A company can own property, have banking account, raise loans, incur liabilities and enter into contracts. Even members can contract with company, acquire right against it or incur liability to it. For the debts of the company, only its creditors can sue it and not its members.

As the company is an artificial person, it can act only through some human agency, *viz.*, directors. They are at the helm of affairs of the company and act as its agents, but they are not the agents of the members of the company. A company has a common seal to authenticate its formal acts.

Lifting of the "corporate veil". You must have understood the principle that the company is an independent legal entity. *In Saloman v Saloman & Co. Ltd.* [(1897) *A.C.* 2], the House of Lords laid down that the company is a person distinct and separate from its members. The whole law of corporation is in fact based on this theory of corporate entity. Now, the question may arise whether this *Veil of Corporate Personality* can ever be lifted or rent (*i.e.* torn). Before going into this question, you should first try to understand the meaning of the phrase "lifting the veil". It means looking behind the company as a legal person,

i.e., disregarding the corporate entity and paying regard, instead, to the realities behind the legal facade. Where the Courts ignore the company and concern themselves directly with the members or managers the corparate veil may be said to have been lifted. Only in appropriate circumstances, are the Courts willing to lift the corporate veil and that too, when questions of control are involved rather than merely a question of ownership.

The following are the cases where modern company law disregards the principle of corporate personality or the principle that the company is a legal entity distinct and separate from its shareholders or members.

(1) In the law relating to trading with the enemy where the test of control is adopted. The leading case in point is *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.* (1916) 2 *A.C.* 307. If the public interest is not likely to be in jeopardy the Court may not be willing to crack the corporate shell. But it may rend the veil for ascertaining whether a company is an enemy company. It is true that, unlike a natural person, a company hasn't mind or conscience, therefore, it cannot be a friend or foe. It may, however, be characterised as an enemy company, if its affairs are under the control of people of an enemy country. For the purpose, the Court may examine the character of the persons who are really at the helm of affairs of the company.

(2) In certain matters concerning the law of taxes, death duties and stamps, particularly where the question of the controlling interest is in issue [*S. Berendsen Ltd. v : Commissioner of Inland Revenue* (1953) *Ch. I* (*C.A.*)]. Where corporate entity is used to evade or circumvent tax, the Court can disregard the corporate entity [*Juggilal v. Commissioner of Income Tax, A.I.R.* (1969) *S.C.* 932]

(3) Where companies form other companies as their subsidiaries to act as their agent. The application of the doctrine may operate in favour of such companies, depending upon the acts of a particular case. Suppose, a company acquires a partnership concern and registers it as a company, which becomes subsidiary of the acquiring company. In an action for compulsory acquisition of the business premises of the subsidiary, it was held that the parent company (which through itself and nominees held all the shares) was entitled to compensation, maintain action for the same [*Smith, Stone and Knight Ltd. v. Lord Mayor, etc. of Birmingham* (1939) 4 *All* 116].

(4) Where the benefit of limited liability of shareholders is destroyed and each shareholder's liability has become unlimited. This happens (under Section 45) when the number of members of a public company or a private company falls below 7 or 2 respectively, and business is carried on for more than six months. In such a situation, every person who is a member and is cognisant of the fact shall be severally liable for the payment of the whole debts of the company incurred during that time.

(5) Under the law relating to exchange control.

(6) Where the device of incorporation is adopted for some illegal or improper purpose, *e.g.* to defeat or circumvent law, to defraud creditors or to avoid legal obligations.

... company does not exonerate a member from his personal liability at all times and in all circumstances. Honest enterprise by means of companies is allowed, but the public are protected against kiting and humbuggary'. The sanctity of a separate corporate indentity is upheld only in so far as the entity is consonant with underlying policies which give it life.

Self-Examination Questions *(Not to be answered and submitted for evaluation. Answers may be had at the end of this study paper).*

1. An association of persons may form a company and get itself registered as such under the Companies Act. What are the considerations which may actuate it do so ?
2. If the members composing the company die or dissociate themselves, the comany also gets extinct. Is it a correct statement ?
3. A company can own property, have a banking account, raise loans, incur liabilities and enter into contracts, whereas its members cannot contract with the company, acquire rights against it or incur liability to it. Examine the veracity of this statement.
4. For the debts of the company, its creditor (a) can, (b) cannot, sue the members of the company. Which is correct ?
5. Are the directors of company agents or the members thereof ?
6. S had been in the leather business for many years and solvent. Later he decided to form a company, the members thereof being S himself, his wife and five children (each having one share) and transferred his business to the company. In consideration thereof S was allotted fully paid up shares and debentures; the latter were secured on the assets of the company. Evedtually, the company had to be liquidated and the assets being insufficient to repay either the debentures or the trade creditors, S claimed preference on the ground of being a secured creditor in respect of the debentures held by him. The unsecured creditors objected to this claim on the ground that S and his company were one and put in a counter claim that their debts should be discharged first. In the circumstances, could S get repayment in priority to the unsecured creditors ?
7. An English company was formed for selling in England tyres produced by a German company in Germany. The bulk of English company's shares were held by the German company. The overwhelming majority of the shareholders and all the directors were German nationals residing in Germany. The English company filed a suit during the World War I to recover a trade debt. Could the company be allowed to proceed with the action ? [*Daimler Co. Ltd. v, Continental Tyre and Rubber Co. (1916) 2 A.C. 307*].
8. X, having huge dividend and interest income, formed four private companies. He agreed with each of such companies to hold a block of investment as an agent for the company. The income received was credited to the accounts of the company but the company gave it back to X as a

pretended loan. In this way, X divided his income with a view to reduce his tax-burden. In a legal proceeding against X, the court ignored the company and concerned itself directly with X. Could the court do so? [In re *Sir Dinshaw Maneckji Petit A.I.R. (1927) Bom. 371*].

9. H was appointed the managing director of A & Co. on the term that he must not, at any time during the tenure of his office as such, or afterwards, seek the custom or entice away the customers of A & Co. Subsequent to the cessation of H's employment under an agreement he set up a business in the name of H & Co. which solicited the customers of A & Co. Evidence showed that H & Co. was formed to enable H to commit a breach of his covenant against solicitation. Could H & Co. and H be restrained from doing so? [*Gilford Motor Co. v. Horne (1932) I. Ch. 935*].

Classes of Companies under the Act: A registered company may be a company is limited by shares or guarantee or unlimited.

(1) *A Company limited by shares*: When the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares. It thus implies that for meeting the debts of the company, the shareholder may be called upon to contribute only to extent of the amount which remains unpaid on his shareholding. His separate property cannot be encompassed to meet the company's debts.

It may be worthwhile to know that though a shareholder is a co-owner of the company, he is not a co-owner of the company's assets. The ownership of the assets remains with the company, because of its nature—as you may recollect—as a legal person. The extent of the rights and duties of a shareholder as co-owner is measured by his shareholding. Thus, all the shareholders of the company are its proprietors: the amount due from all of them is the issued capital of the company. A company limited by shares needs fund for its working—it raises its fund by issuing shares. When the shares are issued, these may be subscribed by the signatories to the memorandum or may be allotted to applicants therefor, either for cash or for consideration in kind.

You may now ask whether, in a company limited by shares, a shareholder has to pay the whole nominal value of its share at the time of acquiring the shares. The answer is in the negative. Subject to the provisions of the articles of the company, its directors may at any time demand from the shareholders payment of the unpaid portion of the nominal amount of the shares. Such demands—technically described as 'calls'—may be made either during the life-time of the company or during the winding up. When the initial working capital provided by the initial payments of the shareholders falls short, directors have the power to make further calls. There is no legal limit as regards and amount of a call. You will therefore notice that both the time for, and the amount of, call are uncertain, depending on the decision of the directors.

(2) *A Company limited by Guarantee*: Section 12 (2) (b) defines it as one having the liability of its members limited by the memorandum to such amount

the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up. Thus, the liability of the member of a guarantee company is limited by a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

From what you have read so far, you will observe that the common features between a 'guarantee company' and 'share company' are legal personality and limited liability. In the latter case, the members' liability is limited by the amount remaining unpaid on the share, which each member holds. Both of them have to state in their memorandum that the members' liability is limited. However, the point of distinction between these two types of companies is that in the former case the members may be called upon to discharge their liability only after commencement of the winding up and only subject to certain conditions : but in the latter case, they may be called upon to do so at any time, either during the company's life-time or during its winding up.

It is clear from the definition of the guarantee company that it does not raise its initial working funds from its members. Therefore such a company may be useful only where no working funds are needed or where these funds can be had from other sources like endowments, fees, charges, donations, *etc.*

Non-profit making Companies : Suppose an association is about to be formed as a limited company for promoting commerce, arts, science, religion, charity or any other useful object and intends to apply its profits or other income in promoting its object and to prohibit payment of any dividend to its members. In such circumstances, the Central Government may, *by licence*, direct that the association may be registered as a company with limited liability without the addition of words 'Limited' or 'Private Limited', to its name. Thereupon, the association may be registered accordingly. On registration (subject to provisions of Section 25), it will have the same privileges and obligations as a limited company has. This licence is revocable by the Central Government, and on revocation the Registrar put 'Limited' or 'Private Limited' against the company's name in the register. But, before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and an opportunity to be heard in the matter.

(3) *An unlimited Company* is one which obviously does not limit the liability of its members. Companies limited by guarantee and unlimited may or may not have a share capital.

Public and Private Companies : Companies are further classified as *private companies*" and "*Public companies*". The Act defines a public company as one which is not a private company. Thus, to understand properly the meaning of term 'public company' one must know the characteristics which constitute a private company. These characteristics are as follows :

(1) *Restriction on transfer of shares* : The articles contain a provision restricting the right to transfer its shares. The object to such a provision is to confine the ownership of and interest in the company to a close circle of friends and relatives. The right of transfer is generally restricted in the following manner,

(a) By authorising the directors to refuse transfer of shares to persons whom they do not approve or by compelling the shareholder to offer his shareholding to the existing shareholders first. It may be noted that it can only restrict the right of sale to a member. On this consideration, the articles usually provided that before selling or transferring his share, the directors must be communicated in writing of such intention of the shareholder.

(b) By specifying the method for calculating the price at which the shares may be sold by one member or another. Generally, it is left to be determined either by the auditor of the company or by the company at a general meeting.

(c) By providing that the shareholders who are employees of the company shall offer the shares of specified persons or class of persons when they leave the company's service.

(2) *Limitation of Membership* : The articles must contain a provision whereby the company limits the number of its members (exclusive of employees who are members and ex-employees continuing to be members) to 50 : in counting the numbers of shareholders, joint shareholders are treated as a single member. The reason why 'employee members' are excluded from the computation is perhaps to enable the company to associate workers with the management of the company and to give them the benefit of owning interest in the company. This will in its turn impel the workers to work for the welfare of the company and thereby to promote industrial peace. That is why, it may be pertinent to note here that Section 77 authorises a company to grant loans to its employees, *etc.*, (other than directors) to purchase its shares.

(3) *Prohibition on making an invitation to public* : The articles must prohibit any invitation to the public to subcribe for any of its shares or debentures. Such a prohibition is necessary for the substance of the private character of the company. One should note that under Section 67, an offer or invitation to a section of the public selected as members of the company is an offer or invitation to the public or debenture-holders of the company. But such an invitation to the public shall be excluded from the category of "invitation to the public" if such offer or invitation can be properly regarded :

(i) as not being calculated to result directly or indirectly in the share or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation ; or

(ii) otherwise as being a domestic concern of the persons making and receiving the offer of invitation.

Consequently, a company is permitted to offer shares or debentures to its members or debenture-holders. An offer of shares by the directors to their friends by a document marked "private and confidential not for publication" is not an invitation to the public [*Sharwell v. Combined Incandescent Metals Syndicate* (*1907*) *23 T.L.R. 482*]. Similarly a circular offering the allotment of shares in a new company in exchange for existing shares is not a prospectus [*Government Stock; etc. Co. v. Christopher* (*1956*) *1 A.E.R. 490*].

Deemed Public Company : The Companies Act has enacted Section 43A so as to create another type of company, *viz.*, *Deemed Public Company*. It is not a public company ; actually, it is a private company which, under certain circumstances, can be treated by the law as the public company. Private companies are granted certain privileges and exemptions by the Act. One of the reasons for this is that a private company does not handle funds belonging to the public in general ; in fact it is not allowed to do so. But a public company may float many fully-owned or partly-owned private companies. In this way, a public company may trade with public money through these private companies thereby evading the statutory disclosures which a public company has to make. To resolve this problem, the Act treats a private company which is a subsidiary of a public company as a public company for all intents and purposes.

The following are the circumstances in which a private company would be a "deemed public" company :

(i) Where not less than 25 per cent of the paid-up capital of a private company is held by one or more bodies corporate, the former, subject to certain exceptions, would be deemed to be a public company.

For the purpose of computation of the percentage (*i.e.* 25%), account must not to be taken of any share in the private company held by a banking company if, and only if, the following conditions are satisfied in respect of such share, namely :—

(a) that the share (i) forms part of the subject-matter of a trust ; (ii) has not been set apart for the benefit of any body corporate; and (iii) is held by the banking company either as trustee or in its own name on behalf of a trustee ; or

(b) that the share (i) forms part of the estate of a deceased person ; (ii) has been bequeathed by the deceased person by his will to any body corporate ; and (iii) is held by the banking company either as an executor or administrator of the deceased person or in its own name on behalf of an executor or administrator of the deceased person.

The Registrar may, however, demand from the banking company such books and papers as he deems fit, if he wants to be satisfied on aforesaid conditions [Section 43 A (1)].

(ii) Suppose, the average annual turnover (the aggregate value of the goods produced, supplied, distributed or controlled or services rendered by the company during financial year) of a private company—whether in existence at the commencement of the Companies (Amendment) Act, 1974 or incorporated thereafter is not, during the relevant period [*i.e.* a period of 3 consecutive financial years : (i) immediately preceding the commencement of the Amendment Act of 1974 ; or (ii) a part of which immediately preceded such commencement and the other part of which immediately followed such commencement ; or (iii) immediately following such commencement or at any time thereafter] is less than Rs. 1 core (*i.e.*, if the turnover is Rs. 1 crore or above). In such a case, the private company shall, irrespective of the paid-up share capital, become a public company on and from the expiry of a period of 3 months from the last day of the relevant period during

which the private company had the said average annual turnover. On thus becoming a public company, it may retain in its articles the provisions of Section 3 (i) (iii) and may function even with number of its members reduced below 7 [sub-section (1A)].

(iii) If the private company comes to hold 25% of the paid-up share capital of a public company having share capital after the commencement of the Amendment Act of 1974, it shall become a public company on and from the date on which the said percentage is first held. If, however, the aforesaid percentage is held by the private company before the commencement of the Amendment Act, 1974, then it shall become public company on and from the expiry of the period of 3 months from the date of commencement. But, if, during this period of 3 months, the said percentage falls below 25%, it shall remain a private company for all intents and purposes. When the private company becomes the public company in the circumstances mentioned above, all other provisions of Section 43A shall apply. In spite of becoming a public company, it can retain its private statutory characteristics and function with members below 7 [sub-section (1B)].

The provision of this Section will not apply to the following cases, namely: (a) where the entire paid-up capital of the private company is held by another single Indian private company or by one or more foreign companies, whether public or private; (b) where the shares in the private company are held by one or more foreign companies which or each of which, if incorporated in India, would be a private company within the meaning of the Companies Act, 1956 provided the Central Government, on an application made to it by that private company, by an order so directs; (c) where the shareholding company or companies is or are a private company or companies and has or have no company as a member and the total number of members of the shareholding company or companies does not exceed fifty excluding employees. To illustrate (c), let us assume that the private company in which shares are held by other companies is A and the shareholding companies are B, C and D. If B or C or D is a public company and holds not less than ·25 per cent of A's capital, A becomes a public company by virtue of Section 43 A. If B, C or D is a private company and each of them does not have a company as shareholder and the total number of members of B, C & D does not exceed 50, excluding employees, then A does not become a public company even though B, C and D together hold more than 25 per cent of A's capital.

Clause (b) is intended to remove the difficulty experienced by small industries working in collaboration with small foreign companies similar to private companies in India due to the restrictions applicable to public companies in regard to managerial remunerations *etc.*

The aforesaid private company is required to file a certificate along with the annual return. The certificate is to be signed by both the signatories of the return. The certificate is to state that it did not hold 25% or more of the paid-up share capital of one or more public companies [sub-section (9)].

Peculiar features of Section 43A Company: The peculiar features of a "deemed public company" are that the number of members may be below the

statutory minimum of 7 members required for a public company cf.ss. 12 and 45 and their articles may contain the provisions of Section 3 (1) (iii) which relate to private companies. Its profit and loss statements filed with the Registrar are also not open to inspection in case where Section 220 (1), Second Proviso, Clause (iii) would apply. In all other respects, all the provisions of the Act relating to public companies will apply to companies becoming public companies by virtue of Section 43A. Therefore, the provisions regarding managerial remuneration and investments would apply in toto to a "deemed public company".

It may be noted that neither Section 81 (1) (c) nor Section 81 (1A) would apply to a private company which has become a public company by virtue of Section 43A but has retained in its articles the three matters referred to in Section 3 (1) (iii). The provision contained in Section 81 (1) (c) of the Companies Act, 1956, cannot be construed in a manner which will lead to the negation of the option exercised by a private company which has become a public company by virtue of Section 43A to retain in its articles the three matters referred to in Section 3 (1) (iii). Both these are statutory provisions and they are contained in the same statute, and must be harmonised, unless the words of the statute are so plain, are unambiguous and the policy of the statute so clear that to harmonise will be doing violence to those words and to that policy. The policy points in the direction that the integrity and structure of "Section 43A—proviso-companies" should, as far as possible, not be broken up. Since Section 81 (1) (c) of the Companies Act, 1956, is subject to the qualification "unless the articles of the company otherwise provide," while interpreting that section and allied provisions of the Act it would be necessary to have regard to the relevant articles of association of a company. In the context in which a private company becomes a public company under Section 43A and by reason of the option available to it under the proviso, the word "provide" must be understood to mean "provide expressly or by necessary implication". The necessary implication of a provision has the same effect and relevance in law as an express provision has, unless the relevance of what is necessarily implied is excluded by the use of clear words. Considering particularly the genesis of "Section 43A—proviso-companies", in order to attract the opening words of cl. (c) of Section 81 (1), it is not necessary that the articles of the company must contain an express provision otherwise than what it contained in cl. (c). *Needle Industries (India) Ltd. and Others v. Needle Industries Newey (India) Holding Ltd. and Others (1981) 51 Comp. Cas. 743 (S.C.).*

Holding and Subsidiary Companies: 'Holding and subsidiary' companies are relative terms. A company is a holding company or another only if the other is a subsidiary. Any of the three circumstances illustrated below must exist to constitute the relationship of holding and subsidiary companies.

(a) A will be subsidiary of B, if B controls the composition of the Board of Director of A, *i.e.*, if B can without the consent or approval of any other person appoint or remove a majority of directors of A. B will be deemed to possess the power to appoint majority of persons as directors of A : (i) when these persons cannot be appointed in that capacity without B's consent, or (ii) when their appointments follow necessarily

from their appointment as directors, manager or the holder of any office in the company ; or (iii) when the holding company (*i.e.*, B) itself or its subsidiary (*i.e.*, A) holds the directorship.

(b) (i) A will be a subsidiary of B, of B is entitled to exercise control over more than half the total voting power of A, where A is an existing company in respect of which the holders of preference shares, issued before the commencement of the Companies (Amendment) Act, 1960 had the same voting rights in all respects as the holders of equity shares.

(ii) Again, A will be subsidiary of B, if B holds more than half in nominal value of its equity share capital, where A is any other company. In other words, B must hold more than 50% of the equity capital or the basis of the nominal capital whatever may be the amount paid up on the shares.

It would thus be noticed that the holding of voting rights in excess of 50% whether through equity or preference capital, would make the company in respect of which the same are held, the subsidiary of the holding company.

For the purpose of condition described in para (ii) above, the shares that a company holds must be held in its own right and not merely in a fiduciary capacity. Thus, the shares held in trust for an individual are to be excluded. On the other hand, shares held by another person as a nominee for the company or any of its subsidiaries should be regarded as being held by the company for the purpose.

It should be noted that a company may become a subsidiary under the condition referred to in paragraph (ii) above through the agency of another company. For example, B and C individually may hold 30% and 21% respectively of the equity capital of A. In such a case if, at time, C becomes a subsidiary of B then A will automatically become a subsidiary of B, provided C's holding is not in any fiduciary capacity. Identical would be the position, if 21% of the capital is held by a nominee for B.

In order to determine whether a company is a subsidiary of another, shares held by any person under the provisions of any debentures of first-mentioned company or of a trust deed for securing an issue of the debentures are not to be taken into account. Also, where a company's ordinary business includes money-lending, shares of the other company held as security in a normal business transaction are to be disregarded.

(c) A company will be subsidiary of another company called holding company, if it is a subsidiary of a subsidiary of the holding company. For example, B is a subsidiary of A and C is a subsidiary of B. In such a case, C will be the subsidiary of A. In the like manner, if D is a subsidiary of C, D will be the subsidiary of B as well as of A and so on.

N.B. The expression, 'private company which is a subsidiary of a public company', appears in several sections of this Act and such a company will be on the same footing as public companies.

Indian private companies which are subsidiaries of foreign public companies are divided into two categories : one, where the entire share capital of the private subsidiary company is held by the foreign holding company, either alone or in consortium with other foreign companies, and the second, where the entire share capital is not so held. For the purpose of this Act, the first category of companies will not be subsidiaries of a 'public company' and as such will not be subject to the controlling provision of the Act relating to such companies. But, for the purposes of this Act, the second category of companies will be treated as subsidiaries of a public company [Section 4(7)].

Public Financial Institutions : *By virtue of Section 4A the following institutions is to be regarded as a public financial institutions.*

(a) The Industrial Credit and Investment Corporation of India Ltd.—a company which was formed and registered under the Indian Companies Act, 1913;

(b) The Industrial Finance Corporation of India—a company established under Section 3 of the Industrial Finance Corporation Act, 1948;
The Life Insurance Corporation of India—established under Section 3 of the Life Insurance Corporation Act, 1956.

(d) The Industrial Development Bank of India—established under Section 3 of the Industrial Development Bank of India Act, 1964;

(e) The Unit Trust of India—established under Section 3 of the Unit Trust of India Act, 1963;

(f) The General Insurance Corporation of India;

(g) The National Insurance Co. Ltd.;

(h) The United India Fire and General Insurance Co. Ltd.;

(i) The Orient Fire and General Insurance Co. Ltd.;

(j) The New India Insurance Co. Ltd.;

(k) The Industrial Reconstruction Corporation of India Ltd.

The Central Government has, however, assumed powers to add any other institution to the above-mentioned list of public financial institution. This addition has to be made through a notification in the Official Gazette. Secondly, the institution, for being added to the existing list, (i) must have been established or constituted by or under any Central Act ; or (ii) at least 51% of the paid-up share capital of such new institution is held or controlled by the Central Government.

Consequences of default in complying with the conditions constituting a company a private company (Section 43) : If contravention is made in complying with the provisions contained in Section 3(1)(iii), the company shall forfeit all the privi-

leges and exemptions conferred on it by the Act, and the Act shall apply to it as if it were not a private company. But the Court may relieve the company from such a consequence, if it is satisfied that the failure in compliance with the said requirement was not deliberate but was accidental or inadvertent or that on other grounds it is just and equitable to grant relief (the Court in this context means the High Court).

Consequences of membership falling below legal minimum (*Section 45*) : If at any time, the number of members of a public company or a private company falls below seven or two respectively and the company continues to carry on its business for a period exceeding six months subsequent to the fall, the member continuing, provided he is aware of the fact, would be severally liable for payment of the whole debts contracted by the company during the period and may be severally used therefor.

Consequences of altering the conditions constituting a private company (*Section 44*) : A company registered as a private company, may in course of time, find that any one of the provisions of Section 3(1)(iii) is a hindrance to or an interference with the development of business. In such a situation, it may decide to convert itself into a public company. If it alters its articles, so as to exclude therefrom the provisions contained in Section 3(1)(iii), it shall cease to be a private company from the date the alteration takes effect. The company must, within 30 days from the date of the alteration, file with the Registrar a prospectus or a statement in lieu of prospectus.

The prospectus must state the matters specified in Part I of Schedule II and set out the reports specified in Part II of Schedule II and Part I and II, shall have effect subject to the conditions contained in Part III of the Schedule. The statement in lieu of prospectus shall be in the form and contain the particulars set out in part I of Schedule IV, and in the cases mentioned in Part II of that Schedule, shall set out the reports specified therein ; and said Part I and II shall be effective subject to the provisions contained in Part III of that Schedule.

If upon conversion the company decides to make a public issue of shares or debentures, it would be necessary for it to issue a *prospectus*; otherwise it may only issue a *statement in lieu of prospectus*. In either case by reason of the requirements of Schedules II and IV as to disclosure, it would be necessary for it to disclose a great deal of information as regards its affairs not requiring disclosure. It would be necessary for it to have at least 7 members and 3 directors. At times, on such a conversion, the company may also decide to include certain provisions in and delete others from, its articles to assist it in its functioning.

Conversion of public company into a private company : A public company can be converted into a private company by passing a special resolution altering its articles so as to include therein the restrictions contained in Section 3(1)(iii) of the Act. A special resolution passed to convert a public company into a private company is binding on dissenting shareholders provided it is *bona fide*, is in the interest of the company as a whole, and is consistent with the objects in the memorandum of association. (*Bai Ramba v. Master Silk Mills* A.I.R. 1955 N.U.R. Saurashtra 927). Under Section 31(1), any alteration made in the articles to

convert a public company into a private company shall not have effect unless such an alteration has been approved by the Central Government.

Rule 4B of the Companies (Central Government's) General Rules and Forms, 1956 lays down that where the alteration of articles of association of any company has the effect of converting a public company into a private company, the company must have the approval of the Central Government. This approval must be had through an application, within three months from the date when the special resolution for the alteration of the articles of the company was passed. The application must be in writing and in Form No. IA or in a form as near thereto as the circumstances of the case admit.

(Further, under Section 192, a copy of the special resolution together with a copy of the statement of material facts annexed under Section 173 to the notice of the meeting at which such a resolution has been passed must be filed with the Registrar of Companies within 30 days from the date it was passed by the company. The copies of the above-mentioned documents must be either printed or typewritten and duly certified under the signature of an officer of the company.)

After obtaining the approval of the Central Government in the manner just discussed, it must file with the Registrar a printed copy of the articles as altered within one month of the date of receipt of the order of approval [Section 31(2A)].

When altering the articles for the aforesaid purposes, the company should take care to see that the articles as a whole conform to the requirements of the Act regarding private companies, *e.g.*, if the articles provide for power to issue share-warrants to bearer, the same must be deleted, for a private company cannot issue the same.

Procedure for conversion of a private company into a public company: A private limited company, if it desires to convert itself into a public limited company, will have to follow the under-mentioned procedure :

(1) It should take the necessary decision in its board meeting and fix up the time, place and agenda for convening a general meeting to alter the articles of association and consequently the name by a *special resolution* as well as to alter by special resolution the "objects" clause of the memorandum subject to the confirmation of Company Law Board under Section 17 and by ordinary resolution the share capital clause under Section 94, if the alteration of share capital is involved in the process.

(2) The company has to see that any change in the articles conforms to the provisions of the Companies Act [Section 31(1)] ; also to see that such change does not increase the liability of any member who had become the member before the alteration.

(3) It must issue notices for the general meeting proposing the special resolutions together with the explanatory statements for the alteration of the articles and the memorandum.

(4) It will have to convene the general meeting in order to pass thereat the special resolutions : (i) for the purpose of the alteration of the memorandum and articles of association ; and (ii) also for the purpose of deleting those articles which

are required to be included in the articles of a private company only [Section 3(1)(iii)]. Such other articles which do not apply to a public company should be deleted and those which apply should be inserted. Consequent upon the above changes, it will have to delete the word "private" from its name [Section 21].

(5) It shall file either the prospectus in the Form prescribed under Schedule II or the statement in lieu of prospectus in the form prescribed under Schedule IV within 30 days of the passing of the resolution mentioned in (4) (iii) above in the manner stated in Section 44.

The aforesaid prospectus or the statement in lieu of prospectus must be in conformity with Parts I and II of Schedule II or with Parts I and II of Schedule IV respectively.

(6) In the matter of the prospectus or the statement in lieu of the prospectus, the company has to adopt abundant caution against any untrue statement being included therein, because inclusion of untrue statement will attract penalty by virtue of Section 44(4). It may be noted that a statement included in a prospectus or statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included. Likewise, where the omission from a prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, it shall be deemed, in respect of such omission, to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(7) It shall file with the concerned stock exchange 6 copies of such amendments on both articles and memorandum, one of which must be a certified copy.

(8) It shall file with the Registrar the said special resolution together with the explanatory statement within 30 days of their passing [Section 192].

(9) It must take some of the steps regarding further issue of capital under Section 81 which are not in common with the steps discussed in relation to further issue of shares.

(10) The company has to apply to the Registrar for the issue of a fresh Certificate of Incorporation for the changed name, namely, the existing name with the word "private" deleted. On issue of such certificate shall the name of the converted company be final and complete [Section 23].

Privileges of Exemptions : A private company can have a greater degree of secrecy as regards its affairs and enjoys greater freedom in its operation. It enjoys some privileges and exemptions which a public company is deprived of. Briefly these are as follows :

1. Two or more persons may form a private company (Section 12(1)).

2. The restriction on the commencement of business contained in Section 149 [excepting those contained in S. 149(2A) which have been made applicable to all companies) do not govern private companies.

3. A private company may allot shares without issuing a prospectus or delivering to Registrar a statement in lieu of prospectus (Section 70).

4. It need not hold a Statutory Meeting or file a statutory report (Section 165).

5. The consent of directors to act as such, and to take up qualification shares need not be filed with the Registrar (Section 266).

6. There is no restriction on the amount of overall managerial remuneration that it may pay (Section 198).

7. The consent of the Central Government for any increase in the remuneration of directors including managing or wholetime director or upon their appointment at increased remuneration, is not required (Section 310).

8. The directorship of a private company is not includible in the maximum number of directorship that a person may hold (278).

9. The consent of Central Government for advancing loans to directors is not required (295).

10. There are no restrictions on the powers of the Board of Directors (Section 293).

11. The Central Government is not empowered to prevent a change in the Board of Directors of a company which is likely to affect management prejudically (Section 409).

12. It can advance loans for the purchase of its own shares (Section 77 (2)].

13. Provisions of Section 416 relating to contracts by agents of a company in which the company is an undisclosed principal, are not applicable.

14. A director can vote on a contract in which he is interested (Section 300 (2) (a)].

15. The provision of Section 81, as regards further issue of capital, do not apply to it.

[For other exemptions, you may refer to Appendix F to the first-mentioned text-book. Further, we have referred to certain Sections which are not included in the new syllabus; nevertheless, you should be at least aware of their existence.]

When Companies must be Registered : No company, association or partnership consisting of more than twenty persons (ten in the case of a banking business) can be formed for the purpose of carrying on any business that has for its objects the acquisition of gains, unless it is registered as a company under the Companies Act, or is formed in pursuance of some other Indian law.

The provision is not applicable to joint Hindu family carrying on a business. But where a business is being carried on by two or more joint families, the provision will be applicable. For example, a Hindu undivided family, consisting of the father, 5 major sons and another such family consisting of the father, 5 major sons and 1 minor son jointly carry on banking business. In such a case 12 major members of the two joint families would be carrying on the banking business and, therefore, the association should be registered under the Companies Act; otherwise it would be regarded as an illegal association. The necessity for such a registration arises on account of the fact that when two or more joint families represented by their Kartas enter into a partnership, the members of the association for the purpose of Section 11 will be not Kartas but also other members of the joint families [*Shyamlal Roy v. Madhu Sudan Ray A.I.R.* 1959

Cal. 380]. However, for the purpose of computing the number of persons carrying on the business, the members of such families are not to be included.

You know that an association which has a membership in excess of the number aforementioned will be an illegal association. What is the significance of the statement? It signifies that, as a body, it will have no legal existence and it cannot be wound up under the Act, or even as an unregistered company. Neither a member of it would be able to sue it, nor would it be able to sue the member. Nevertheless, a member who has paid any money to the association would be able to recover it from the director or agents or the association before the money so paid has been applied to an illegal purpose [*Geenberg v. Cooperstein* (1965) *Ch* 657 followed in *Ram Das v. Kunut Dhari A.I.R.* (1925). Every person who is, or continues to be a member of an association in the circumstances described above, is personally culpable for all liabilities incurred in such business and every member is in addition, punishable with fine not exceeding Rs. 1,000. Further, Section 631 makes it punishable for any person or persons to trade or carry on business under any name or title of which 'limited is the last word, without being fully incorporated.

A company, association or partnership not compulsorily registrable at the inception under Section II of the Act of 1956 would become so registrable if, during its continuance, its number of members exceeds the minimum prescribed by the Act. The restrictions laid down by Section II apply not only to the first formation of a company, but they also rule its continuance [*Nibaran Chandra v. Lalit Mohan* (1939) *Cal.* 187].

An association of more than 20 persons, if unregistered, is invalid at its inception and cannot be validated by subsequent reduction in the number of members below 20 (*Madanlal v. Jankiprasad* 48 *All* 319), nor can a contract entered into by such an illegal association befor registration be made valid and be sued against on a subsequent registration [*Gujarat Trading Co. v. Tricumjee* 3 *Bom. H.E.R* (*O.C.J.*) 45].

Where an association is formed in contravation of Section II, no relief can be granted either to the association or to any of its members, as the contractual relationship on which it is founded is illegal (*Badri Prasad v. Nagormal AIR* 1959 *S.C.* 559).

Section II will apply only where a company, association or partnership carries on business and has for its object the aquisition of gains either by itself or by any of its members. Section II is designed to prevent the mischief which may arise from large trading business being carried on by a fluctuating body. It has, however, been held that illegality or invalidity in the constitution of an association does not affect its liability to tax or its chargeability as a unit of assessment [*Kumarswamy Chettiar v. I.T.O.* (1957) *I.T.R.* 457].

Mode of Registration : In the case of a public company, any 7 or more persons (associated for any lawful purpose) may form an incorporated company with or without limited liability by subscribing their names to memorandom and otherwise complying with the requirements of the Act. In exactly the same way, 2 or more persons can form a private company (Section 12). These persons apply

to the Registrar of Companies for registration. Along with this application, they are required to submit to the Registrar the following documents :

(1) Memorandum of Association [Section 33 (1) (a)].

(2) Articles " " [" " (1) (b)].

(3) A declaration that the requirements of the Act and the rules framed thereunder have been complied with. This declaration is required to be signed by an advocate of the Supreme Court or High Court or an attorney or a pleader having the right to appear before a High Court or a chartered accountant in practice in India, who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company.

According to Section 12, the essence of a validity incorporated company is that it must consist of a particular number of persons and be an association for a lawful purpose. Unless the purpose appears to be unlawful *ex facie* or is transperently illegal or prohibited by any statute, it cannot be regarded as an unlawful purpose. The question of *motive* inducing the founders of a company is unrelated to the scope of Section 12. This is because it is not a field of enquiry for the Registrar, which Section 12 recognizes as legitimate. Therefore, the motive or the conduct of the individuals forming the association is redundant—the only material consideration being whether the purpose of the association is permitted by law. A right is given to the citizens to form a limited concern. So long as there is nothing illegal or unlawful in the objects of the association, they cannot be denied this right. The fact that the company is calculated to affect the interests of its workers would not nullify it.

The Registrar need not enquire into the circumstances in which the company was proposed to be formed there is no such obligation on him. In spite of this, if he undertakes any such enquiry, he would be exceeding his jurisdiction and such an excess is not permissible. The same concept underlies Section 35 which gives legislative recognition to the dictum of the Judicial Committee in I.L.R. Cal. I (P.C.) extending the conclusiveness of the certificate to matters precedent and incidental thereto.

Besides the aforementioned documents, the company must give a notice of the situation of its registered office under Section 146 within 30 days after registration.

If you recall Section 12, you will find that only a person can be a signatory to the memorandum. It follows therefore that a firm cannot be a signatory to the memorandum, for it is not a person having an individuality separate from that of its partners ; only individuals or other legal entities can be members of a company (*Ganesh Das v. R.G. Cotton Mills Co.* (1974) *C.W.N.* (436). But under Section 25 (4), a firm may continue to be a member of any association or company to which a licence has been issued under this Section by the Central Government entitling it to be registered as a company with a limited liability. But it is an exception to the generality of the law which precludes the firm from being accepted as a shareholder of a company.

Self-Examination Questions

10. A Hindu undivided family consisting of 11 persons carries on banking business with a view to acquiring profit for itself or its members without itself being registered under the Banking Regulation Act, 1949. (a) Will it be a legal association ? (b) Will your answer be the same, if two undivided families would have carried on the said business ?

11. At the inception the association was not registrable under the Act as its membership number did not exceed the statutory limit. But long thereafter the number of its members exceeded that statutory limit. Could the association continue with the business for gain without registration ?

12. For determining the legality or otherwise of the object of an incorporated company, can the motive which actuated the founders of the company to form the association be looked into ?

13. Can a firm be a signatory to memorandum ?

14. According to Section 25 (4) a firm may continue to be a member of a company to which a licence has been granted by the Central Government entitling it to be registered as a limited company. How can you reconcile this position with your answer to Question 13 ?

Memorandum of Association : The memorandum of association of a company is in effect its charter ; it defines its constitution and the scope of the powers with which it has been established under the Act. It is the very foundation on which the whole edifice of the company is built.

"Fundamentally, there are two objects in registering the memorandum. First, that the intending corporator who contemplates the investment of his capital may know within what fields it will be incurring risks. Secondly, that anyone dealing with the company may know without reasonable doubt whether the contractual relationship which he is proposing to enter into with the company is one relating to matters within its corporate objects". A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business which is beyond the power conferred on it by the memorandum. If it does so, it would be *ultra vires* the company and void. A memorandum is a public document under section 610. Consequently, every person entering into a contract with the company, is presumed to have the knowledge of the conditions contained therein.

Contents of Memorandum : The particulars of clauses which the memorandum of a company must contain are as under :

(1) The name of the company, with 'Limited' as the last word and 'Private Limited' in the case of a private company.

(2) The State in which the registered office will be situated.

(3) The objects of the company, in the case of a company in existence immediately before the commencement of the Companies (Amendment) Act, 1965.

In the case of a company formed after the commencement of the Amendment Act, 1965, the memorandum must contain (a) the main objects of the

company, together with other objects incidental or ancillary to the attainment of the main objects ; (b) other objects of the company not included in (a) above.

(4) In the case of a company (other than a trading corporation), with objects not confined to one State, the State to whose territories the objects extend.

(5) A declaration that the liability of members is limited.

(6) A statement as to the amount of share capital, and its division into shares of fixed amount.

The memorandum must conclude with a declaration of association signed by the subscribers, who shall add their description, address and occupation, each stating against his name the number of shares he agrees to take. The signatures of the subscribers must be attested ; one witness is usually sufficient and he must add his address, description and occupation. It must be printed and divided into paragraphs, numbered consecutively, and should be in one of the forms in Tables B, C, D, and E of Schedule I to the Act as applicable to the type of the company or in a form as near thereto as circumstances admit (Sections 14 and 15).

Doctrine of *ultra vires* : The meaning of the term *ultra vires* is simply "beyond (their) powers". The legal phrase "*ultre vires*" is applicable only to acts done in excess of the legal powers of the doer. This presupposes that the powers are in their nature limited. To an ordinary citizen, whatever is not expressly forbidden by the law is permitted by the law. It is only when the law has called into existence a person for a particular purpose or has recognised its existence—such as in the case of a limited company—that the power is limited to the authority delegated expressly or by implication and to the objects for which it was created. In the case of such a creation, the ordinary law applicable to an individual is somewhat reversed, whatever is not permitted, expressly or by implication, by the constituting instrument is prohibited not by any express prohibition of the legislature, but by the doctrine of *ultra vires*.

It is a fundamental rule of Company Law that the objects of a company as stated in its memorandum can be departed from only to the extent permitted by the Act—thus far and no further (*Ashbury Railway Company Ltd. v. Riche*). In consequence, any act done or a contract made by the company which travels beyond the memorandum or which is not expressly or impliedly warranted by it, is beyond the powers not only of the directors but also of the company. As a result, such an act or contract is wholly void and inoperative in law and is therefore not binding on the company. On this account, a company can be restrained from employing its fund for purposes other than those sanctioned by the memorandum. Likewise, it can be restrained from carrying on a trade different from the one it is authorised to carry on.

The impact of the doctrine of *ultra vires* is that a company can neither be sued on an *ultra vires* transaction, nor can it sue on it. Since the memorandum is a "public document", it is open to public inspection ; therefore, when you deal with a company, you are deemed to know about the powers of the company. If in spite of this, you enter into a transaction which is *ultra vires* the company, you

cannot enforce it against the company. For example, if you have supplied goods or performed service on such a contract or lent money, you cannot obtain payment or recover the money lent. But if the money advanced to the company has not been expended, the lender may stop the company from parting with it by means of an injunction ; this is because the company does not become the owner of the money, which is *ultra vires* the company. As the lender remains the owner, he can take back the property *in specie*. If the *ultra vires* loan has been utilised in meeting lawful debts of the company then the lender steps into the shoes of the debtor paid off and consequently he would be entitled to recover his loan to that extent from the company.

An act which is *ultra vires* the company being void, it cannot be ratified by the shareholders of the company. Sometimes, act which is *ultra vires* can be regularised by ratifying it subsequently. For instance, if the act is *ultra vires* the power of the directors, the shareholders can ratify it ; if it is *ultra vires* the articles of company, the company can alter the articles ; if the act is within the power of the company but is done irregularly, the shareholders can validate it.

Alteration of the Memorandum : The memorandum may be altered only to the extent and in the manner provided by the Act (Section 16) which allows alterations by a special resolution followed by confirmation thereof by the Company Law Board only for the undermentioned purposes :

Special resolution and the Company Law Board's confirmation are not necessary in the circumstances mentioned in para (f). Also confirmation of the Company Law Board is not necessary in the case described under para (c)]

(a) Changing the place of its registered office from one State to another—Section 17.

(b) Changing the object—Section 17.

(c) Changing the name—Sections 21, 22 and 23 (approval of Central Government is necessary).

(d) Changing any other provisions contained in the memorandum including those relating to the appointment of managing director or manager in the same manner as the articles of the company (that is by special resolution) or in any other manner provided by the Act—Section 16 (3).

(e) Creating reserve liability—Section 99.

(f) Increasing, consolidating, sub-dividing or otherwise altering the share capital—Section 94.

(g) Reducing the share capital—Section 100.

(h) Rendering unlimited the liability of its directors or of any director—Section 323.

Shareholders' right can be altered or modified according to the provisions contained in Sections 106 and 107, which will be dealt with in Study Paper III.

An alteration that has the effect of increasing the liability of a member to contribute to the share capital, or requires him to take more shares, or otherwise to pay money to the company, shall not bind an existing member, unless he agrees to it in writing (Section 38).

According to the proviso to Section 38 where the company is a club or any other association and the alteration requires the member to pay recurring or periodical subscriptions at a higher rate, although he does not agree in writing to be bound by the alteration, it will bind him.

Name : A company may, by special resolution, and with the approval of the Central Government, signified in writing, change its name (*S. 21*). However, such an approval of the Central Government would not be necessary where the only change in the name of the company is the addition thereto or the deletion therefrom of the word "Private" consequent upon the conversion as per the provisions of this Act of a public company into a private company or *vice versa* (Proviso to S. 21). It may be noted that this amendment is designed to obviate the technical necessity of obtaining Government's approval for the mere addition or deletion of the word "private" to and from a company's name in the aforesaid circumstances.

The name of public limited company must end with the word "Limited" and that of a private limited company with the words "Private Limited." But, as you have already noticed earlier, the Central Government may, by a licence, authorise a company which is a non-profit-making association to change its name so as to omit the word or words, "Limited or Private Limited", as the case may be, by passing a special resolution.

No company shall be registered by a name which, in the opinion of the Central Government, is undesirable—Section 20 (1). Under the Emblems and Names Act, 1950, names like U.N.O. and W.H.O. cannot be used by the companies without the prior sanction of the Central Government. If the proposed name of a company is identical with or too nearly resembles the name of another company which is already in existence, the Central Government may refuse to register it [Section 20 (2) ; *Ewing v. Buttercup Margarine Co. Ltd*]. The company must also be permitted to mention the fact that it is the successors to proprietary concern or firm, *etc.* In this way, goodwill is preserved.

A change of name can be made only by a special resolution and with the approval in writing of the Central Government (Section 21). If through inadvertence *etc.*, the name is identical with, or too nearly resembles, the name by which a company, in existence, has been previously registered, it may be changed by ordinary resolution with the sanction of the Central Government. If the change is required by the Central Government within twelve months of the registration, the company shall make the change by ordinary resolution and with the previous approval of the Central Government within three months of the date of the direction of the Central Government being received or such longer period as the Central Government may deem fit to allow—Section 22 (1).

Where the name of a company has been changed, the Registrar shall issue fresh certificate with the change embodied therein. The change in name shall not affect any of the company's rights and obligations—Section 23.

The name and the address of the registered office must be printed or affixed outside every office or place of business in the characters of one of languages in general use in the locality and mention in all business letters, bill heads, letter

papers, notices and other official publications. The name should be engraved on the seal and mentioned in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods, invoice, receipts, *etc.* The characters must be legible. The address of the registered office is required to be shown—Section 147.

The use of words "Limited" and "Private Limited" by any person or body of persons not incorporated with a limited liability or as a private limited company, as the case may be, is an offence punishable with a fine—Section 631.

Registered Office: Every company must have registered office where: (a) necessary documents may be served upon, or deposited; (b) notices, writs, *etc.*, may be issued; (c) inspection may be had, and (d) communication may be made. The domicile and the nationality of a company is determined by the place of its registered office. This situs is also important for determining the jurisdiction of the Court.

A company must have a registered office as from the day on which it commences business, or as from the 30th day after the date of its incorporation whichever is earlier. It may be noted that the address of the registered office ordinarily is not to be stated in the memorandum of association. For if this was done, every change therein would require the amendment of the memorandum. It is advisable to provide in the articles that the registered office should be situated at such place as the Board should from time to time fix. Otherwise, the registered office cannot be removed outside the city, *etc.*, where it is situated without special resolution.

Notice of the situation of the registered office and of every change therein must be sent to the Registrar (otherwise than through a statement as to the address of the registered office in the annual report) within 30 days of the date of incorporation or the date of change. This provision is designed to locate the spot where the records of the company could be inspected and where the letters should be addressed and notices served upon the company.

The address may be changed within the local limits of any city, town or village where such office is situated but a special resolution will be required if the change of the registered office is from one village, town, *etc.*, to another village, *etc.*, in the same State (Section 146). But if the change is from one State to another, the confirmation of the company Law Board is essential.

The law, as contained in Section 17(3), requires notice for this to be served on all the shareholders. In an Orissa High Court case, only two shareholders out of three had passed the special resolution and as such, the resolution was held to be invalid. Again, when an application is made for a change in registered office of a company from one State to another, the former State is the authority whose interests are affected by this change and thus has the *locus standi* to such an application (*Orient Paper Mills Limited v State A.I.R. 1977 Orissa 582*).

Further, in another case, the Orissa High Court observed that the location of a registered office is not a matter to be dealt with leniently, having regard to the intention of the legislature and the spirit of the law. It is through vast and varied experience based on sound principles that the English law has come to

make it incumbent on a company to state in its memorandum the situation of its office at particular place. Once this situation of office has been declared, it becomes an unalterable condition of the company's constitution, which nothing short of a registration can change. The Court must be satisfied as to the *bona fides* of the company's application for the proposed change. Thus where a company, proposing to change the location of registered office from Orissa to Andhra Pradesh had relied on Section (17) (1) (a) for the change on the ground of more direct and economic administration, but had failed to clarify how the expenses would be curtailed or how the administration from Andhra Pradesh could be more direct, while the factory or unit of production was Orissa, it was held that the *bona fides* of the company's application for the change were questionable (*Orissa Chemicals and Distilleries Private Ltd. In re.* [illegible] *R.* [illegible] *Orissa 62*).

Objects Clause. The powers of the company are limited to : (a) powers expressly given by the memorandum (termed "express" powers) or conferred by statute, (b) powers reasonably incidental or necessary to the company's main purpose (termed "implied" powers).

You will perhaps recall that acts beyond the company's powers are *ultra vires* and void, and cannot be ratified even though every member of the company may give his consent [*Cranbury Railway Carriage Co. v. Riche* (1875) L.R. 7 H.L. 653]. The test to be applied whether a power is implied or not, is not the benefit the transaction is expected to confer on the company, but whether it can reasonably be regarded as arising from the main object of the company. Thus, tramway might justifiably generate its own power to drive its trams; but it could be restrained from running buses, even though the latter activity may be more profitable.

It is well established that if the main purpose of the company is completely achieved or becomes impossible of implementation, the company must be wound up, and will not be entitled to continue in existence merely because the secondary objects are still possible of being given effect to [*Re : Cannon Date Coffee Co.*] unless the memorandum provides that the several objects are to be constructed as independent objects—*Cotman v. Brougham* (1918) A.C. 314

It is customary to exclude the general rule of construction for the interpretation of the intentions contained in different clauses of the memorandum of association, by including a statement that the objects specified in each paragraph of the memorandum shall be in no way limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.

The subscribers to the memorandum may choose any "object" or "objects" for the purpose of their company. There are two restrictions, however, on the selection of "objects" for a company : (i) the objects should not include anything which is illegal or contrary to law or public policy, *e.g.*, floating a company for dealing in lotteries (*Ex parte More* (1931) 2 K.B. 197) ; or trading with alien enemies (*Daimler & Co. v. Continental Tyre Co.* (1916) 2 A.C. 307). Objects which are in restraint of trade [*Mac. Ellis v. Ballymacalligot etc. Company* (1919) A.C. 459] ; or are blasphemous (but not denying Christianity) have also been held to be bad

[*Bowman v. Secular Society* (1917) A.C. 406]; (ii) the objects should not also contemplate doing anything which is prohibited by the Companies Act, *e.g.*, buying the company's own shares. Apart from those two restrictions, the object of a company may be anything that the proposed company desires to achieve [*Lal Gopal Dutt v. Khorotriah Mego Zilte Zamindary Co. 16 C.W.N.* 297].

As you have noticed earlier, a company can exercise only those powers that are lawfully and expressly granted to it and those which may be implied as reasonably necessary to the exercise of those powers.

The intending shareholder who contemplates the investment of his capital may wish to know the field in, or purpose for, which it is going to be used and what risk he is taking in making the investment. Similarly, any person who intends to deal with the company may wish to know beyond reasonable doubt whether the contractual relation into which he contemplates entering into with *the company is one relating to a matter within its corporate objects. The objects* clause enables shareholders, creditor and all those who deal with the company to know what its powers are and what is the range of its activities and enterprise. It is therefore true that the objects clause of the memorandum of association of a company is of fundamental importance to its members as well as to its non-members. In the first place, it gives protection to subscribers (members) who learn from it the purpose to which their money can be applied. In the second place, it protects persons dealing with the company, who can infer from it the extent of the company's powers. The narrower the objects appended in the memorandum, the lesser is the subscriber's risk ; the wider these objects, the greater is the security of those who transact business with the company.

Alteration of Objects : The members of a company may rightly expect that their money would be employed only for the objects for which company has been established. Accordingly, the Act permits alteration of the objects, only so far as is considered necessary for specified purposes. Section 17 permits a company to alter its objects for the undermentioned purposes :

(i) to carry on business more *economically* ;
(ii) to attain the main purpose of the company by new or *improved means* ;
(iii) to carry on some business which under the existing circumstances may *conveniently or advantageously be combined* with the existing business ;
(iv) to change and enlarge the local area of operations ;
(v) to restrict or abandon any of the existing objects ;
(vi) to sell or dispose of the whole or any part of the undertaking ;
(vii) to amalgamate with any other object or body or person.

The alteration must be effected by a special resolution, and confirmed by the Company Law Board (C.L.B.). The confirmation may be either wholly or partially and on such terms and conditions as the C.L.B. may deem fit, due regard being have to the rights and interests of the members of the company and of every class of them, as well as of the rights and interests of the creditors of the company and of every class or them. But prior to confirmation of the alteration, the C.L.B. must be satisfied of two things : (i) that notice has been given to all debenture-

holders and persons whose interests are likely to be affected by the alteration ; (ii) that either the dissentient creditors' consent to the alteration has been sought, or their debts or claims have been discharged, determined or secured. The C.L.B. must also cause a notice of the petition for confirmation of the alteration to be served on the Registrar and he must be afforded reasonable opportunity to appear before the C.L.B. and place his objections and suggestions, if any, regarding the confirmation of the alteration.

The company must, within three months from the date of the order of the C.L.B. file with the Registrar a certified copy of the order confirming the alteration along with a printed copy of the memorandum as altered and the Registrar thereupon shall register the same and certify the registration under his hand within one month from the date of filing such documents.

If these documents are not filed within the stipulated time, such alteration and the order of the C.L.B. confirming the alteration and all proceedings connected therewith shall, at the expiration of such period, become void and inoperative. The Company Law Board may, however, on sufficient cause being shown, revive the order or an application made within a further period of one month [Section 19 (2)]. Section 640A provides that in computing the period for filing the orders of the C.L.B. the time taken in drawing up the order and in obtaining copy thereof shall be excluded.

Steps to be taken by a company—(a) for transfer of its registered office from one State, say West Bengal to another State, say Tamil Nadu ; and (b) for starting a business for which there is no provision in the objects clause of the memorandum of association : (a) The company may, by a special resolution, alter the provisions of its memorandum so as to change the place of its registered office from West Bengal to Tamil Nadu ; this change also needs confirmation of the Company Law Board. When an application is made for a change as aforesaid, it is the State where the registered office is at present situated, i.e. West Bengal whose interests are likely to be affected by the change and thus will have the *locus standi* to oppose such an application [*Orissa Paper Mills Ltd. v. State A.I.R. (1957) 582*]. Furthermore, it shall be necessary to satisfy the Company Law Board as to the *bona fides* of the company's application for the proposed change [*Orissa Chemicals and Distilleries Pvt. Ltd. In Re A.I.R. (1961) Orissa 67*]

(b) Since the present "objects clause" of the company in question does not contain any enabling provision for the company to carry on the proposed business, the objects clause will have to be altered. The alteration can be only for 7 purposes specified in Section 17(1) discussed earlier.

The alteration shall not be effective or operative until it is confirmed by the Company Law Board [Section 17(2)]. Debentureholders and creditors are entitled to be heard by the Company Law Board unless it decides otherwise. However, the Registrar of Companies has a right to be heard. *As Mitra J. observed In Re Ganeshberi Tea Co. (Pvt.) Ltd. (1964) Comp. Cas. 556* "in deciding as to whether a company should be allowed to start additional business, an application made in this behalf is not to be disallowed merely because the new business is wholly different from and bears no relation to the existing business of the company. All that is essential

is that it should be capable of being conveniently and advantageously combined with the existing business and is not destructive of or inconsistent with the existing business." It is likely, therefore, that the alteration will be confirmed. Under Section 18(1), a certified copy of the Company Law Board's order confirming the alteration together with the printed copy of the memorandum as altered must be filed with the Registrar within 3 months from the date of the order. It should be noted that on the objects clause being altered as aforesaid, the company would not be automatically entitled to commence the proposed business since the provisions of Section 149(2A) would also require compliance therewith.

Section 149(2A) prohibits a public limited company from commencing any business other than that covered by the main objects of the company, unless it has, by a special resolution, approved of the commencement of such business and a duly verified declaration by one of its directors or its Secretary in the prescribed form that such a resolution has been passed or, as the case may be, the provisions of Section 149(2B) have been complied with, has been filed with the Registrar. In the context of this prohibition, a distinction has been made between a company existing immediately before the commencement of the Amendment Act of 1965 and one formed after such commencement. In the former case, the special resolution is required for commencing a new business, in relation to any of the objects mentioned in its memorandum, which is not germane to the business it was carrying on at the commencement of the Amendment Act. In the latter case, the special resolution is necessary to set up a business in relation to any object other than its main objects, or those ancillary to it, on its memorandum.

Thus, for commencing the proposed new business, a special resolution of the company would be necessary. An ordinary resolution would be sufficient if, in addition, the Central Government, on an application by the Board of Directors, allows the company to commence such a business [Section 149(2B)].

Significance of Articles of Association : The articles of association of a company are its rules and regulations which are framed to manage its affairs. Just as the memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated, so also the articles are the internal regulations of the company (*Guiness v. Land Corporation of Ireland, 22 Ch. D.* 349, 381). These general functions of the articles have been aptly summed up by Lord Cairns in *Ashbury Carriage Co. v. Riche* as follows. "The articles play a part subsidiary to memorandum of association. They accept the memorandum as the charter of incorporation, and so accepting it the articles proceed to define the duties, the rights and powers of the governing body as between themselves and the company at large and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made."

The articles of association are in fact the bye-laws of the company according to which directors and other officers are required to perform their functions as regards the management of the company, its accounts and audit. It is important therefore that the auditor should study them and, while doing so, he should note the provisions therein in respect of several matters, mentioned in the textbook.

Every company limited by guarantee or an unlimited or a private limited company is required to register its articles along with the memorandum of association. If a public company limited by shares does not register spacial articles, the regulations contained in Table A would be applicable as if these were the articles of the company.

In the case of public companies limited by shares and registered after the commencement of the Act, Table A shall apply in so far as it has not been excluded or modified by special articles.

Alteration of Articles : Section 31 vests companies with power to alter or add to its articles. A company cannot divest itself of these powers [*Andrews v. Gas Meter Co.* (1897) 1 *Ch.* 361]. Matters as to which the memorandum is silent can be dealt with by the alteration of articles [Section 19(1)]. The alteration must be effected by special resolution. The fundamental rights of a company to alter its articles is subject to the following limitations :

(a) The alteration must not exceed the powers given by memorandum or conflict with the provisions thereof.

(b) It must not be inconsistent with any provisions of the Companies Act or any other statute.

(c) It must not be illegal.

(d) It should not be in fraud of a minority, or inflict a hardship on a minority without any corresponding benefits to the company as a whole. The Court will not interfere unless the alteration could reasonably be considered as being not for the benefit of the company (*Brown British Abrasive Wheel Co.* (1919) 1 *Ch.* 290 ; *Sidebottom v. Kerghew Lesse & Co. Ltd.* (1920) 1 *Ch.* 154).

(e) The alteration must not be inconsistent with an order of the Court. Under Section 404 any subsequent alteration thereof which is inconsistent with such an order can be made by the company only with the leave of the Court.

(f) It may be regarded as having a retrospective effect so long as it does not affect the things already done by the company [*Allen v. Gold Rees of West Africa (1900) 1 Ch. 656 ; McArthur v. Gulf Line, (1909) S.C. 732*].

(g) If a public company is converted into a private company, then the approval of the Central Government is necessary [Section 31 (1) Proviso]. Printed copy of altered articles shall be filed with the Registrar within one month of date of Central Government's approval [Section 31 (2A)].

It may further be noted that an injunction cannot be granted to prevent the adoption of new articles which constituted a breach of contract. But if the company acts on them it may be liable to damages [*Shirlaw v. Southern Foundries Ltd. 1940 A.C. 701 (760)*].

(h) An alteration that has the effect of increasing the liability of a member to contribute to the company is not binding on a present member unless he has agreed thereto in writing (Section 38].

(f) A reserve liability once created cannot be undone but may be cancelled —on a reduction of capital: *Midland Railway Carriage Wagon Co. (1907) W.N. 175*; (*Section 99*).

(j) Any irregular alterations which have been acted on for many years are binding (1902) A.C. 232.

Copies of Memorandum and Articles: A company is bound on payment of one rupee by a member, to supply within seven days of requisition a copy of the Memorandum and Articles of Association and even agreement and resolution referred to in Section 192 not embodied in memorandum or articles. The copies must be in accordance with any alterations which have been made before the date of issue of the copies.

Doctrines of Constructive Notice and Indoor Management: In consequence of the registration of the memorandum and articles of association of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents. This is because these documents are construed as "public documents" under Section 610 of the Companies Act, 1956. Accordingly, if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into a transaction which is *ultra vires* these documents, he must do so at his peril. If someone supplies goods to a company in which it cannot deal according to its objects clause, he will not be able to recover the price from the company. Suppose, the articles provide that a bill of exchange must be signed by two directors. If the bill is actually signed by one director only, the holder thereof cannot claim payment thereon. But the doctrine of constructive notice is not a positive one, but a negative one like that of estoppel of which it forms part. It operates only against the person who has been dealing with the company but not against the company itself; consequently, he is prevented from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority *ultra vires*. Thus, the doctrine is a "cloud" for the strangers.

But the aforesaid doctrine of constructive notice does in no sense mean that outsiders are deemed to have notice of the internal affairs of the company. For instance, if an act is authorised by the articles or memorandum, an outsider is entitled to assume that the detailed formalities for doing all that Act have been observed. For example, the directors of R.B.B. Ltd. gave a bond to T. The articles empowed the directors to issue such bonds under the authority of a proper resolution. In fact, no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been passed *The Royal British Bank v. Turquand (1956) E. & B. 327*. This is the doctrine of indoor management, popularly known as Turquand Rule, which is the only limitation to the doctrine of constructive notice discussed above.

Thus, you will have noticed that the aforementioned rule of Indoor Management is important to persons who deals with a company through its directors or other persons. They are entitled to assume that the acts of the directors or other officers of the company are validly performed, if they are within the scope of their

apparent authority. So long as an act is valid under the articles, if done in a particular manner, an outsider dealing with the company is entitled to assume that it has been done in the manner required. The abovementioned doctrine of Indoor Management or Turquand Rule has limitations of its own. That is to say, it is inapplicable to the following cases, namely,—

(a) When the person dealing with the company has notice, whether actual or constructive, of the irregularity (*Moris v. Kenssen* (*1946*) *A.C. 459*; *Devi Ditta Mal. v. The Standard Book of India* (*1927*) *I.C. 568*). Thus director of a company cannot normally claim the benefit of the rule in the Turquand Case where he is also acting for the company in the transaction.

(b) Where the person dealing with the company is put upon an inquiry, for example, where the transaction is unusual or not in the ordinary course of business. When a sole director and principal shareholder of a company paid into his own account with a bank a cheque drawn in favour of the company, the said bank was held to be put upon an enquiry and the bank could not rely upon the ostensible authority of the director (*Underwood* (AL) *v. Bank of Liverpool* (1924) *1 K.B. 775*). Likewise, a person who deals with a company may be put upon enquiry by reason of the unusual magnitude of the transactions having regard to the position of the agent who is acting for the company. (*Houghton & Co. v. Nothard Lowe & Wills* (*1917*) *2 K.B. 147, 149*; *Rama Corporation Ltd. v. Proved Tin & General Investments Ltd.* (*1952*) *2 K.B. 147, 152*).

The company documents "are open to all who are minded to have any dealings whatsoever with the company and those who deal with them must be effected with notice of all that is contained in those two documents. After that..... all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted (by the company's documents, namely, memorandum or articles)... When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company". (Lord Hatherly in *Mahony v. East Holyford Mining Co.* (*1875*) *L.R. 7 H. L. 869*).

(c) Where an instrument purporting to be executed on behalf of the company is a forgery. The doctrine of indoor management applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery which must be regarded as a nullity. (*Ruben v. Great Fingal Consolidated* (*1966*) *A. C. 439*; *Official Liquidator v. Commnr. of Police* (*1969*) I *Comp. L.J. 5* (*Mad*).

A critical examination of the statement that the memorandum and articles of association of a company cannot be altered except with the Court's permission; It

would be evident from the under-mentioned discussion on the provisions of law that such a blanket statement is not correct.

According to Section 16 of the Companies Act, the conditions contained in the memorandum of a company can be altered only in the cases, in the mode and to the extent for which express provision is made in the Act. For changing the place of registered office of the company from one State to another and its objects, a special resolution and the confirmation of the alteration by the Company Law Board are necessary (Section 17), but *not the Court's permission.* The change of name by a company also requires a special resolution and the approval of the Central Government and not the Company Law Board, and for that matter, not the Court's (Section 21). The liability clause of the memorandum cannot be altered so as to render the limited liability of members unlimited except in one circumstance as contemplated by Section 45, i.e., where the number of members falls below the statutory minimum of 7 or 2 in the case of public or private limited company respectively and the business of the company is carried on for more than 6 months; in this case no other formalities are requirred to be complied with. Again, under Section 323 (which is not included in your syllabi, nevertheless you should have a knowledge of this as well), a limited company may, if so authorised by the articles, by a special resolution, alter its memorandum so as to render unlimited liability of its directors or manager ; in this case too there is *no necessity to seek the Court's permission.* Even for the alteration of the company's share capital in the shape of increasing, consolidating, sub-dividing, cancelling, Section 94 (2) specifically states that no confirmation by the Court *is required.* Only in the matter of reduction of share capital, acquisition of the confirmation by the Court has been prescribed by Section 100.

In the matter of alteration of articles, Section 31 (1) requires only a special resolution for the purpose, and if such resolution has the effect of converting a public company into a private company, the proviso thereto requires the approval of the Central Government—*not of the Court*—for its operation.

It is thus clear that the headline statement, unqualified as it is, cannot be said to be correct.

Contractual Relationship Between Different Parties Formed on Registration of Memorandum and Articles : Section 36 of the Act provides that the memorandum and articles of association, when registered, must be binding on the company and the members thereof to the same extent as if each of them had individually signed the documents, so far as covenants contained therein are concerned. As a result, a number of legal relationship is formed between different parties and the company which is described below :

(a) *Between the members and company* : The memorandum and articles constitute a contract between the members and the company. In consequence, the members are bound to the company under a statutory covenant. For instance, it has been held in *Bradford Banking Co. v. Briggs* that where the articles give the company in lien upon each share for debts due by shareholders to the company, and where a shareholder mortgages his shares and the mortgagee serves notice thereof upon the company, the mortgagee would have priority over the company,

only if the [illegible] *had incurred a liability to the company after the notice of the mortgage given to the company. If, on the other hand, the shareholder had incurred a liability before the notice of mortgage was given to the company, the company would have the priority.*

(b) *Between the Company and the members* : Views differ on the questions as to whether and how far the memorandum and articles bind the company to the members. One view is that it is bound just as its members are. Another view is that the company is not wholly bound. But it seems that courts, instead of conforming to either of these views, have [illegible] to take a [illegible] media. It is not true to say that the company is wholly bound [illegible] member can enforce any article against it. But it is bound to the extent that any member can sue it so as to prevent any breach of the articles which are likely to affect his right as a member of the company (*Hickman v. Kent Sheepbreeders' Association* (1915) 1. Ch. 881). Thus, an individual member can file a suit against the company to enforce his individual rights, *e.g.*, right to vote, right to contest election for directorship of the company, right to get back his shares wrongfully forfeited, right to receive a share certificate, share warrants to bearer or notice of general meetings etc. (*Pender v. Lushington* (1817) 7 Ch. D 70 ; *Nuguffa v. Madras Race Club*, A.I.R. 1951 Md. 83 ; C.L. Joseph v. Los A.I.R. 1965 Ker. 68). The member suing in such cases "sues not in the right of a member but in his own right to protect from invasion of his own individual right as a member" (*Per Jenkins L.J. in Edwards v. Halliwell* (1950) 2 All. E.R. 1064 at p. 1067).

(c) *Between Members inter se* : In the case of Wood *v. Udessa Water Works Co.* (1889) 42 C.H.D. 636 Sterling J. observed : "The Articles of Association constitute a contract not merely between the shareholders and the company but between each individual shareholder and every other".

The forego[illegible] principle had been further clarified by the decision in another English case... [illegible] *v. Saffery* (1897) A.C. 315. In this case, the learned Judge observed that "It is quite true that the articles constitute a contract between each member and the company and that there is no contract in terms between the individual members of the company but the articles do not, any the less, in my opinion, regulate the right *inter se*. Such rights can [illegible] by or against a member through the company or by the liquitator representing the company, but no member has as between himself and another member any right beyond that which the contract with the company gives him."

This proposition is not free from controversy because of the conflict of judicial opinions ; in fact, until the decision in *Rayfied v. Hands* (1950) Ch. 1, weightage of judicial opinion was against a member being bound to other members. In this case, the articles of a private company provided that "every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value." It was held that the articles bound the directors as members to do so and that this obligation was a personal one which could be enforced against them by other members directly, without joining the company as a party. Obviously, the Court was influenced by the fact that the company was a private company which "bears a close analogy to partnerships".

(d) *Between the Company and the Outsiders*: The memorandum and the articles do not constitute a contract between the company and an outsider. Neither the company nor the members are bound by the articles to outsider, since these constitute a contract between members, *inter se*, and outsider is not a party to the articles although he may be named therein.

Nonetheless, an outsider is entitled to assume that in respect of contract entered into with him all the formalities required to be carried out under the articles or memorandum have been duly complied with (*Royal British Bank v. Turquand* (*1856*) *6 E.B. 327*).

Self-Examination Questions :

15. The memorandum of a company stated that it was formed to work German patent to manufacture coffee from dates, to acquire and purchase any other inventions for similar purpose and to import and export all description of produce for the purpose of food. The German patent was not granted. But the company was solvent and the majority of the shareholders wished that the company should continue. Could the company be allowed to continue ? [*Re German Date Coffee Co.* (*1882*) *20 Ch. D. 169*].

16. (a) Suppose, the company wants to shift its registered office from Asaf Ali Road to Parliament Street, New Delhi. Is a sanction for it through a resolution necessary ? (b) If the registered office is proposed to be changed from Brabourne Road, Calcutta to Howrah, what kind of resolution is needed for the purpose ?

17. The registered office of a company is situated in Orissa. Its factory was also in Orissa. It applies to the Court for the change of its registered office from Orissa to Andhra Pradesh on the ground of more direct and economic administration. But it fails to clarify how the expenses will be curtailed or how the administration from Andhra Pradesh can be more direct, when the factory will remain in Orissa. Can you, in the circumstances, question the *bona fides* of the company's application for the proposed change ?

18 The object of the company was to promote, assist and protect cyclists. Later on, it sought power to assist motorists. Would alteration of the memorandum for the purpose be permissible ?

19. A sole director and principal shareholder of a company paid into his own account with a bank a cheque drawn in favour of the company. Could the bank rely on the Turquand cases ?

20. The doctrine of indoor management (a) applies, (b) does not apply, in the following cases :

(i) When the person dealing with the company has notice of the internal irregularity.

(ii) Where he is put upon an enquiry. Which is correct ?

21. Where a public company has been converted into a private company, will the approval of the Central Government be necessary ?

22. *The alteration in the articles has in consequence increased the liability of a member to contribute to the company. In such a circumstance, will the alteration be binding on a present member ?*

23. *If any irregular alterations have been acted upon for many years, will these be binding ?*

24. The original articles of a company contained no powers to issue preference shares. Later, the articles were altered by a special resolution so as to assume the necessary power, and preference shares were issued accordingly. Would the alteration be effective ? [*Andrews v. Gas Meter Co.* (1897) 8 *Ch.* 361].

25. The articles of a company give it a lien upon each share for debts due to the company by shareholders. A shareholder mortgages his shares and the mortgagee serves notice thereof upon the company. Who will have prior claim over the shares, if the shareholder has incurred a liability to the company (a) before the service of the notice of mortgage, (b) after the service ?

26. The articles of a company provided that the salary of the managing director should not exceed Rs. 1,500 per month and the rate of commission payable to him should not exceed 5% of the profit. Notwithstanding thus it was resolved in a general meeting of the company that the managing director be paid a salary of Rs. 2,500 per month, and commission of 8% and the resolution was declared by chairman to have been carried by a show of hands. One of the shareholders subsequently brought an action against the company and the directors for a declaration that the resolution was not binding on the company; Could he bring such a suit without the permission of the company ?

Preliminary or Pre-incorporation Contracts : Pre-incorporation contracts are those contracts which are entered into by agents or trustees or and on behalf of a prospective company before it has come into existence, *e.g.*, with the proprietor of a business to sell it to the prospective company. Since a company comes into existence from the date of its incorporation, it follows that any act purporting to be performed by it prior to that date is of no effect so far as the company is concerned. It will very likely be the intention of the promoters of persons concerned in the company that the company should, on its formation acquire some property or take over the existing business, and for this purpose, a preliminary contract for the acqusition may be entered into before the company is formed. But as the company is non-existent before incorporation, it cannot be bound by any purported ratification [*Kelner v. Baxter* (1862) L.R. 2 C.P. 174].

The rules in respect of preliminary contracts may be summarised as follows :

(a) The vendor cannot sue, or be sued by the company thereon, after its incorporation ;

(b) Person who acts for the intended company remains personally liable to the vendor even if the company purports to ratify the agreement, unless the agreement provides that—

(i) his liability shall cease if the company adopts the agreement ; and

(ii) either party may rescind the agreement, if the company does not adopt it within a specified time ;

(c) *After incorporation, the company may adopt the preliminary agreement.* But this must be by novation which may be implied from the circumstances. But in some cases, the memorandom directs the directors to execute such contracts. The company can enforce a pre-incorporation contract if it is warranted by the terms of incorporation and for purposes of company.

A pre-incorporation contract can be enforced against the company if it is warranted by the terms of incorporation and it is adopted by the company. Sections 15 and 16 of the Specific Relief Act, 1973). In such a case, the directors have no discretion in the matter.

Pre-incorporation contracts must be distinguished from contracts entered into by a company after incorporation, but before it becomes entitled to commence business (See under Commencement of Business).

Promoters : Persons who initiate promotion of a company are known as promoters. All persons who take steps for the registration of a company, *e.g.*, those associated with the preparation of a prospectus or in drawing up the Memorandum of Association of the company and assisting in its registration are regarded as promoters. It should, however, be noted that persons acting only in a professional capacity *e.g.*, the solicitor, banker, accountant etc. are not regarded as promoters. The Act does not define a promoter, and whether a person is a promoter in any particular case depends on the facts having regard to the person's actions and his relationship to the company that is formed. Any one who assists in the formation for a consideration payable if the company is floated, is a promoter. "Pictures formed in our minds is that of a person who, after rising to affluence by preying on the susceptibilities of a gullible public, finally retires from the scene in the blaze of a sensational suicide or Old Bailey Trial," (Grower ; Modern Company Law, 2nd Edition). "They are those who set in motion the machinery by which the Act enables them to create an incorporated company," [per Lord Blankburn in *Erlanger v. New Sombrero Phosphate & Co.* (1898) 3 *App. Cas.* 1218).

Promoter's duty to disclose ; Until a company is incorporated, a promoter stands in a fiduciary capacity towards the company and its prospective shareholders. Hence, he must not make, either directly or indirectly or through a nominee *etc.*, any profit out of his trust, unless the company after full disclosure of the facts, consents. Such disclosure is ineffective if made merely to directors who are nominees of the promoters. Disclosure may be made either to an independent board, or by means of a prospectus to the prospective shareholders. If the promoter makes a secret profit, the company can rescind the contract or compel him to account for it. Where all the members of a private company are cognisant of the facts, the rule would not apply.

Promoters as vendor ; A promoter is entitled to sell his own property to the company, provided he makes proper disclosure. This applies also to property which he acquires during the promotion and which he resells to the company. If he fails to make disclosure the company may either (a) rescinded the contract, or (b) compel the promoter to surrender the profit.

Promoter's remuneration : A promoter has no right to demand from the company for his promotional services in the absence of an express contract with the company. Indeed, in the absence of such a contract, he cannot even recover from the company payments he has made towards legal fees, stamp duties, registration fees, or other expenses in connection with the formation of the company.

Certificate of Incorporation : Upon the registration of the documents mentioned earlier under the heading "Documents to be filed for registration of the company" and the payment of the necessary fees, the Registrar of Companies issues a certificate that the company is incorporated, and in the case of a limited company that it is limited (Section 34)

Section 35 provides that a certificate of incorporation issued by the Registrar in respect of any association, shall be conclusive evidence of the fact that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act.

The certificate of incorporation is conclusive as to all administrative acts relating to incorporation and as to date of incorporation. Thus, in *Jubilee Cotton Mills v. Lewis* (1924) A.C. 958, the Registrar issued on 8th January a certificate dated 5th January. It was held that an allotment of shares made on 6th January could not declared void on the ground that it was made before the company was incorporated. The certificate is not, however, conclusive evidence of the fact that all the objects of the company, as set out in the memorandum, are legal [*Bowman v. Secular Society* (1917) A.C. 406, 435],

Commencement of Business : A company having a share capital which has issued a prospectus inviting the public to subscribe for its shares cannot commence any business or exercise any borrowing powers unless :

(a) the minimum number of shares which have to be paid for in cash has been subscribed and allotted ;

(b) every director has paid, in respect of shares for which he is bound to pay an amount equal to what is payable on shares offered to the public on application and allotment ;

(c) no money is or may become liable to be repaid to applicants of any shares or debentures effered for public subscription by reason of any failure to apply for or to obtain permission for the shares or debentures to be dealt in on any recognised Stock Exchange ; and

(d) a statutory declaration by the secretary or one of the directors that the aforesaid requirements have been complied with, is filed with the Registrar.

If, however, a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, it cannot commence any business or exercise borrowing powers unless it has issued a statement in lieu of prospectus and the condition contained in paragraphs (b) and (d) aforementioned have been complied with.

But the foregoing provisions are not applicable to a private company [sub-Section (7) of Section 149].

By the Companies Amendment Act of 1965, sub-Section (2A) has been added with the objective to restrain companies from commencing any business to pursue "other objects of the company" which are not incidental or ancillary to the main objects whether or not any segregation between the two has been made as contemplated by the provisions contained in Section 13 (I). (b) of the Companies Act, unless the following conditions have been complied with :

(i) That the company has approved of the commencement of any such business by a special resolution passed in that behalf at a general meeting ; and

(ii) That the company has filed with the Registrar a declaration duly verified by one of the directors or secretary, in prescribed form, that the resolution has been passed or the Central Government in pursuance of an application made under sub-section (2B) has permitted the company to commence such a business.

If the company commences any such business in contravention of this provision every person who is responsible for the contravention, without prejudice to any other liability, would be punishable with a fine.

In the Explanation to sub-section (2A), it is stated that the restriction contained in the foregoing provision of law is to be construed as one applicable to only new business which is not germane to the business which the company was carrying on at the commencement of the Companies (Amendment) Act, 1965, in relation to any of the objects referred to in the said clause.

This provision is intended to prohibit a company from commencing any business not related or ancillary to its main objects without obtaining the prior approval of the shareholders by a special resolution.

Contracts entered into by a company after its incorporation and before it is entitled to commence business are provisional only and are not binding on the company until the trading certificate is issued—Section 149 (4). The expression "provisional" denotes that the contract should be read subject to an implied term that it shall not be binding until the company becomes entitled to commence business. Consequently, should the company go into liquidation, without commencing business, such contracts cannot be enforced at all [*Re Otto Electrical Co.* (1906).2 *Ch.* 390]. This rule is applicable to allotments whether first or subsequent [*Mutual Bank of India v. Suban Singh* (1936). *Lah.* 790]. Under similar conditions, moneys for goods supplied (*Re Otto Electrical Co.*), remuneration for services rendered [*New Drive & Co. v. Blakiston* (1908) 24 T.L.R. 563] as well as preliminary expenses incurred on behalf of the company to be incorporated (*Re National Motor Co.* 908 2 *Ch.* 228) cannot be recovered. It is also not possible to invoke Section 70 of the Contract Act in such a case (*Re Ambica Textilers* 54 C.W.N. 157). Also the company cannot enter into a contract for the sale or purchase of any property (*Kishangarh Electric Co. v. United States of Rajasthan A.I.R.* 1960 *Raf* 40).

Board of Company Law Administration: In pursuance of Section 10E the Companies (Amendment) Act, 1963 the Central Government has constituted

effect from 28th April, 1964 a Board, called the Board of Company Law Administration to exercise and discharge such powers and functions conferred on the Central Government by or under this Act or any other law as may be delegated to it by that Government.

The Board shall consist of such number of members, not exceeding nine, (as amended by the Amendment Act of 1974) as the Central Government deems fit. One of the members is to be appointed the Chairman of the Board by the Central Government.

The propriety of an act done by the Board shall not be called into question on the ground (i) that there existed a defect in the constitution of, or (ii) that there was vacancy in the Company Law Board. But the Board shall be subject to the control of the Central Government in the exercise of its powers and discharge of its functions.

The procedure to be followed by the Board shall be such as may be prescribed.

For the convenience of administration, the Board has been empowered to authorise in writing, subject to approval by the Central Government, the chairman or any of its members or its principal officer to exercise and discharge the powers that are delegated to him or them by the Board, subject to such conditions and limitations as are prescribed in the order in writing of the Board. The exercise and discharge of a power by chairman or any other persons aforementioned in pursuance of such a direction will be deemed to be an act of the Board.

The Companies (Amendment) Act, 1974, has added three sub-Sections to Section 10E. Without prejudice to the provision contained in the immediately preceding paragraph, the Board may form one or more Benches from among its members. But prior to such formation, the Central Government's approval is necessary. Also, the formation of the Bench, if made, must be by an order in writing by the Board. The Board may authorise each such Bench to exercise and discharge such of the powers and functions of the Board as may be specified in the order. On being so authorised, any order made or any act done by the Bench is to be deemed to be that of the Board [sub-Section (4B)].

The said Bench shall have powers which are vested in a Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters *viz.*, (a) discovery and inspection of documents or other material objects producible as evidence ; (b) enforcing the attendance of witness and requiring the deposit of their expenses ; (c) compelling the production of documents or other material objects producible as evidence and impounding the same : (d) examining witnesses on oath ; (e) granting adjournments ; and (f) reception of evidence on affidavit [sub-Section (4C)].

The said Bench is to be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. Every proceeding before the Bench is to be treated as a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and for the purpose of Section 196 of that code.

These newly added provisions mentioned above are designed to enable the Central Government to assume *quasi* judicial powers for administration of the Companies Act, without going through the long-drawn, dilatory and cumbrous processes of Courts.

Self-Examination Questions :

27. A company was being formed to purchase a hotel from K. A contract was entered into on behalf of the company by A, B, and C for the purchase of stock of certain value from K. The company was formed and the goods were made over to it and consumed. But before payment was made, the company went into liquidation. (a) Could the company by subsequent ratification of the contract bind itself to K ? (b) Could A, B and C be held personally liable on the said contract ?

28. A syndicate of which E was the head, bought an Island which is said to contain valuable mines of phosphate for £ 55,000. E formed a company to purchase this island, and contract was made between X (a nominee of the syndicate) and the company for its purchase at £ 1,10,000. The promoters of the company did not disclose the profit they were making. Could the company rescind the contract and recover the purchase money from E and other members of the syndicate ?

29. The Registrar issued on 8th January a certificate of incorporation dated 6th January. An allotment of shares was made on 6th January. Could the allotment be declared void on the ground that it was made before the company was incorporated ?

30. What will be the consequences if a private company defaults in complying with any of the provisions contained in Section 3 (1) (iii) ?

31. The number of members of a private limited company falls below 2 on 1-7-79. The company continues to carry on its business with the reduced number till 1-11-79. During the intervening period between 1-7-79 and 1-11-79, the company contracts a debt of Rs. 5,000. (a) Will the continuing member be severally liable for the whole debt ? (b) Would the continuing member be severally liable for the whole debt, if the company with the reduced number had continued business say up to 3-1-80 and the said debt had been incurred during the period between 1-7-79 and 1-7-80 ?

ANSWERS TO THE SELF-EXAMINATION QUESTIONS

1. Limitation of individual risk, procurement of capital and technical and managerial personnel, corporate personality, transferability of shares etc. ; 2. No ; 3. Partially correct ; 4. (b) ; 5. No. 6. Yes. 7. No. 8. Yes ; 9. Yes, character of company ; 10. (a) Yes ; 10. (b) No : 11. No ; 12. No : 13. No ; 14. By stating that it is an exception to the general rule that firm cannot be accepted as shareholders of the company, 15. No ; 16. (a) No ; 16. (b) Special ; 17. Yes ; 18. No ; 19. No ; 20. (b) ; 21. Yes ; 22. No unless he has in writing agreed; 23. Yes ; 24. Yes ; 25. (a) Company ; 25. (b) Mortgagee ; 26. Yes ; only if action of the majority consituted a fraud on the minority ; 27. (a) No ; 27. (b) Yes ; 28. Yes ; 29. No. ; 30. Forfeiture of the statutory privileges and exemptions and subjection to the whole of the Act ; 31. (a) No ; 31. (b) Yes.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL

I.S.P. (N) CL—2

INTERMEDIATE COURSE (N)

COMPANY LAW

STUDY—II

Contents :

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Prescribed Readings :

1. *Lectures on Company Law,* by S.M. Shah (18th Edition)
2. *Principles of Company Law,* (5th 1977 Edition) by M.C. Shukla & S.S. Gulshan.
3. *Indian Company Law,* IV Edition by Avtar Singh.

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You will recollect that we mentioned in the preceding Study Paper that one great advantage of floating a public limited company was the raising of capital required for business from the general public. But this does not mean that it must necessarily approach the public for money. The promoters, if they are resourceful enough, can very well tap their private resources or contacts for raising the requisite capital. In such a case, the promoters need not prepare a 'prospectus' proper; but they must prepare a document, akin to the prospectus known as "Statement in lieu of prospectus". This document must contain matters set on in Schedule III to the Act. The matters to be disclosed in this regard are more or less the same as those required to be disclosed in a prospectus.

Now you should know what a prospectus is

Definition: Section 2 (36) of the Act defines the term. Accordingly, it means any prospectus, notice, circular, advertisement or other documents inviting offers from the public for the subscription or purchase of any shares in, or debenture of a body corporate. In this context, you should note that prospectus is not an offer in itself but an invitation to make an offer, signifying thereby that on acceptance of such an invitation by any member of the public, no binding contract between him and the company comes into being; it is rather a counter offer by him to the company which, when accepted by it, brings into existence a binding contract.

You have seen from the definition that a document cannot be regarded as a prospectus, unless it is an invitation or an offer to the public. While is the connotation of the term 'public' in this context? It includes any section of the public, "whether selected as member or debentureholders of the company concerned or as clients of the person issuing the prospectus or in any other way" [Section 67 (1)].

The next issue worthy of consideration is this: When can the invitation for offer (which we referred to earlier) be not treated as having been made to the public? You have noticed that Section 67 (1) & (2) treats an offer or invitation made to a section of the public selected as members of the company, as an offer or invitation to the public. But Section 67 (3) excludes from the category of "invitation to the public" any invitation or offer to the members or debentureholders of the company in either of the two circumstances specified therein: (1) If the invitation or offer can properly be regarded in all circumstances as not being calculated or result directly or indirectly in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, it shall not be treated as having been made to the public. (2) Secondly, if it can be properly regarded as being a domestic concern of the persons making and receiving the offer or invitation, it will not be treated as having been made to the public. Thus, to determine whether or not an offer has been made to the public, the test is not who receives the offer or the invitation but who can accept it if only the person to whom it has been made are entitled to accept it and nobody else, then it is hit by Section 67 (3); it is not made to the public. For example, when a prospectus was issued only to a small circle of friends of the directors,

or to the existing members, it was held that it was not an offer to the public [*Lynde* v. *Nash* (*1928*) *2 K.B. 93*].

The prospectus is the basic document on the basis of which the intending investors decide whether or not they should subscribe to the shares or debentures. Therefore, the law requires unstinted disclosure of various matters through prospectus and forbids variation of any of the terms and conditions of a contract contained therein except with the approval and authority of the company in general meeting (Section 61).

"Those who issue prospectus holding out to the public great advantage which will accrue to persons who take up shares on the representations contained therein, are bound to state everything with scrupulous accuracy and not only to abstain from stating as fact that which is not so but to omit no fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares" [as per *Kindersley V.C. in New Burnswick and Canada Railway Co.* v. *Muggridge*].

It is, therefore, essential that the information statutorily needing disclosure is stated fully and precisely so that the investing public which is ignorant of the present and future prospects of the company may get all the information which is likely to affect the public mind. It is only to protect the members of the public against their being misguided by half truths or falsehoods that the law casts a liability on various persons connected with the issue of the prospectus to compensate every person (who subscribes on the faith of the prospectus) for any loss or damage he may have sustained because of the inclusion of any untrue statements in the prospectus (Section 62).

Contents of Prospectus : Comprehensive rules and regulations have been incorporated into the Companies Act in respect of this basic document which is the only source for the investors to ascertain the soundness or otherwise of the company. Since the prospectus is intended to save the investing public from victimisation, the Legislature has aimed at securing the fullest disclosure of all materials and essential particulars and laying the same before all the prospective buyers of shares. Briefly the rules and regulations are as follows.

I. **Dating of Prospectus** : According to Section 55, every prospectus must be dated. This requirement is designed to ensure a *prima faice* evidence of the date of its publication. However, this evidence may be rebutted by a contrary evidence.

II. **Registration of Prospectus** : It is absolutely necessary for the company to deliver to the Registrar a copy of every prospectus for registration. It must be made on or before the prospectus is published. But the prospectus must not be issued more than 90 days after the date on which a copy of it is delivered to the Registrar for registration. If it is issued, say, 91 days after, it shall be deemed to be a prospectus a copy of which has not been delivered for registration.

Before delivering a copy of the prospectus to the Registrar, it must be signed by every person who has been named therein as a director or a purposed director or by his agent duly authorised in writing. Moreover, the copy must be accompanied by : (i) consent to the expert, when the report of an expert is to be published ; (ii) a copy of every contract regarding managerial personnel's appointment and remuneration ; (iii) every other material contract if it is not entered into in the ordinary course of business or 2 years prior to the date of the prospectus ; (iv) a report required by Part II of Schedule II indicating by way of adjustments as regards the figures of any profits or losses or assets and liabilities ; (v) the written consent of persons named in the prospectus as the auditor, legal adviser, attorney, solicitor, banker of the company or intended company, to act in that capacity.

Every prospectus must state a copy thereof has been delivered for registration. It must specify and document needing endorsement on or attached to the copy delivered for registration, or refer to statements included in the prospectus which specified those documents.

The company and every person, knowingly a party to the issue of the prospectus without registration, shall be liable to a fine extending up to Rs. 5,000 (Section 60).

III. Matters to be stated and report to be set out in the Prospectus (Section 56) : Every prospectus must state the matters specified in Part I Schedule II and set out the report specified in Part II of Schedule II and the said Part I and II have effect subject to the provisions contained in Part III of that Schedule. These briefly are as follows :

1. (a) The main object of the company with the names descriptions, occupations and address of the signatories to the memorandum, and the number of shares subscribed for by them.

(b) The number and classes of shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

(c) The number of redeemable preference shares intended to be issued with particulars as regards their redemption.

(2) (a) The number of shares, if any, prescribed by the articles as the qualification of a director.

(b) Any provision in the articles as to the remuneration of directors whether for their services to the company as directors, managing directors, or otherwise.

(3) The names, descriptions, occupations, and addresses of the directors or proposed directors, the managing director or proposed managing director, if any, the manager or proposed manager, if any, and any provision in the articles or in the contract entered into as regards their (except directors' or proposed directors') appointment, remuneration and compensation for loss of office.

4. Where shares are offered to the public for subscription, particulars as to minimum subscription required for various purposes, *e.g.*, purchase-price of any

property purchased or to be purchased, preliminary expenses, underwriting commission, working capital, etc., as stated in Clause (5) of Schedule II.

5. The time of the opening of the Subscription Lists.

6. The amount payable on application and allotment of each share, and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the last two years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

7. The substance of any contract or arrangement, or proposed contract or arrangement whereby any opinion or preferential right of any kind has been or is proposed to be granted to any person to subscribe for any shares in, or debenture of, a company, giving the number, description and amount of any such shares or debentures.

8. The number, description and amount of shares and debentures which, within the last two years, have been issued or agreed to be issued as fully or partly paid-up otherwise than in cash.

9. The amount paid or payable as premium, if any, one each share issued within two years preceding the date of the prospectus or is to be issued stating the necessary particulars.

10 The names of the underwriters of shares or debentures, if any, and the opinion of the directors that the resources of the underwriters are sufficient to discharge their obligations.

11. The names, occupations, descriptions and addresses of the vendors of any property purchased or proposed to be purchased wholly or partly out of the proceeds of the issue offered for subscription, by the prospectus or the purchase of which has not been completed at the date of the issue of the prospectus.

12. The amount, if any, or nature and extent of any consideration paid within the last two preceding years, or payable to any person as underwriting commission on shares or debentures.

13. The amount or estimated amount of (i) preliminary expenses and (ii) the expenses of the issue, and, the person by whom any of these expenses have been Paid or are payable.

14. The amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter or officer and the consideration for the same.

15. The dates of, parties to, and general nature of, every contract appointing or fixing the remuneration of managing director or manager and of every other material contract not entered into in the ordinary course of business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of the prospectus.

16. The names and addresses of the auditors.

17. The nature and extent of the interest of every director or promotor in the promotion of the company, or in any property acquired by the company within two years of the date of the prospectus or proposed to be acquired by it.

18. If the share capital is divided into different classes of shares, the right of voting at meetings conferred by and the rights in respect of capital and the dividends attached to, the several classes of shares respectively.

19. (A) If the company has no subsidiary, a report by the auditors of the company with respect to : (i) profit and losses for each of the five financial years immediately preceding the issue of the prospectus : (ii) assets and liabilities as at the last date to which the accounts of the company were made up; and (iii) the rate of dividends, if any, paid by the company in respect of each class of shares in the company for each of the five financial years immediately preceding the issue of the prospectus. (B) If the company has a subsidiary or subsidiaries in addition to the aforementioned reports, the auditor's report should state either : (i) as a whole with the combined profits or losses of its subsidiaries so far as they concern the members, or individually with profits or losses of each subsidiary so far as they concern members of the company, or, instead of stating separately the company's profits or losses, deal as a whole with the profits or losses of the company, and so far as they concern members of the company, with the combined profits or losses of its subsidiaries ; (ii) as a whole with the consolidated balance sheet of its subsidiaries with or without the parent company's assets and liabilities or separately assets and liabilities of each subsidiary, on segregating therefrom the interest of persons who are not members of the company.

20. If the proceeds of the issue or any part of the proceeds are or is to be utilised directly or indirectly in the purchase of any business or an interest in a business as a consequence of which the company will become entitled to an interest as to either capital or profits and losses or both in such business exceeding 50 per cent thereof, a report by the accountant (who will be named in the prospectus) in regard to the following matters : (i) the profits or losses of the business for each of the five financial years preceding the issue of the prospectus ; and (ii) the assets and liabilities of the business made up-to-date, which is not more than 120 days before the issue of the prospectus or if it is a body corporate, those at the date to which its accounts were made up.

The said report must show :

(a) How the profits or losses of the other body corporate dealt with by the report would, in respect of the shares proposed to be acquired have concerned members of the company and what allowances would have fallen to be made in relation to assets and liabilities so dealt with for holders of other shares if the company had, at all material times, held the shares now proposed to be acquired ; and

(b) where the other body corporate has subsidiaries, the assets and liabilities and profits and losses of the subsidiaries, in the manner stated in para (B) above.

The provisions of Section 56 (1) are not applicable to any issue of a prospectus or form of application relating : (a) to shares in or debentures of, the company to existing members or debentureholders ; (b) to shares or debentures which are or are to be in all respects uniform with shares or debentures previously

issued and for the time being dealt in or quoted on a recognised stock exchange [Sub-section (5)].

Legal Significance : You have been told in earlier pages of this Study Paper that a company cannot normally vary at any time the terms of a contract in the prospectus and that it can do so only with the approval and authority obtained from its general meeting (Section 61). Suppose, there is a condition in the prospectus, which requires or binds an applicant for shares or debentures to waive compliance with any of the requirements relating to the statutory matters and reports. In such a case it will be void. Similarly, if there is a condition which has the effect of affecting him with the notice of any contract, document or a matter not specifically referred to in the prospectus, then such a condition shall be void [Section 56 (2)].

Suppose, the requirements of Section 56 have not been complied with but the application for shares has been accepted by the company. Can the applicant ask for the rescission of the contract or rectification of the register ? The answer is "no". But he can use the person responsible for the issue of the prospectus for any damages he may have suffered [*South of England Nutural Gas. and Petroleum Co. (1911) I. Ch. 573*].

The form of application for shares in, or debentures of, a company is not to be issued to any person unless it is accompanied by a prospectus containing the matters and reports mentioned earlier. But this provision will not apply to a case where the application forms were issued either : (a) in connection with a *bona fide* invitation to a person for entering into an underwriting agreement in respect of the shares or debentures, or (b) in relation to shares or debentures which were not offered to the public.

You should also note that a director or other person responsible for the issue of the prospectus does not incur any liability for the non-compliance with or contravention of the requirements of Section 56, if he is able to prove, as regards any matter not disclosed, that he had no knowledge of the lapse ; or that non-compliance or contravention was the result of an honest mistake of fact on his part or in respect of matters which were not material [Section 56 (4)].

Statement of Experts : Before we go into this aspect, we must know who is an 'expert'. The term includes an engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him [Section 59 (2)]. The report of an expert cannot be included in a prospectus if he is in any way connected with the formation or promotion or management of the company (Section 57). In other words, the person must be independent to "function as an expert". Even if he is unconcerned or unconnected or impartial, his report in this capacity cannot be included : (a) unless he has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of the copy of the prospectus to the Registrar for registration, and (b) unless a statement as to his consent and non-withdrawal of it appears in the prospectus (Section 58). It is a sound rule designed to protect a prospective investor by making the 'expert' a party to the issue of the prospectus and making him liable for

untrue statements. If the report of the expert is published in contravention of the provisions of Section 57 or 58, every person who is knowingly a party to the issue of the prospectus shall be punishable with fine which may extend to Rs. 5,000 (Section 59).

Suppose, an expert has given his consent to the inclusion of his report in the prospectus (as required under Section 58) or has withdrawn has consent before the issue of the prospectus and in spite of this the prospectus has been issued. In either of these circumstances, the directors of the company and every other person who authorised the issue of the prospectus shall be liable to indemnify the expert against all damage, costs and expenses which he may have incurred on account of his being associated with the issue of the prospectus as an expert [Section 62 (3)].

What is a Mis-statement ? According to Section 65, an untrue statement or mis-statement is one which is misleading in form and context in which it has been included in the prospectus. Where certain matter which is material enough has been omitted from the prospectus, and the omission is calculated to mislead those who act on the faith of the prospectus, the prospectus shall be deemed, in respect of such omission, to be a prospectus, in which an untrue statement is included. The prospectus in these circumstances may also be described as a "misleading prospectus".

The legal consequence of inclusion of mis-statement in a prospectus is that it attaches civil liability to certain persons. They are as follows :–

(1) Every person who is a director of the company at the time of the issue of the prospectus. (2) Every person who has authorised himself to be named and is named in the prospectus either as a director or as having agreed to become a director immediately or after an interval of time. (3) Every promotor including a person whoparticipated in the preparation of the prospectus or the untrue part thereof but not acting in a mere professional capacity (*e.g.*, banker, broker and solicitor) of the company. (4) Every person who has authorised the issue of the prospectus. In this connection, you should also know that an expert or a person who has given his consent to his name being mentioned in the prospectus in the capacity of an auditor, legal adviser, etc., is also liable but only to the extent of any untrue statement purporting to have been made by him as an expert.

Before we dilate upon the nature of the liability (referred to earlier) for making an untrue or wrong statement, we must know the principle on which this liability is based. The principle is that directors and other persons who are responsible for the issue of the prospectus indirectly hold out to the public that great advantages are likely to accrue to those members of the public who would take up shares in the company. This "holding out" casts onerous duty on them, *i.e.*, they must state the facts honestly and faithfully. They must not only abstain from stating something as a fact when it is not actually so, but also must not omit a fact which they know or should have known and the existence of which might in any degree affect the nature or quality of the privileges and advantages which the pros-

pectus holds out as inducements to take shares. This principle was propounded in *New Brunswick, etc. Land Co.* v. *Muggeridge*.

If the persons responsible for the issue of the prospectus fail to discharge such an onerous obligation resulting in an untrue statement being crept into the prospectus, then certain rights accrue to the shareholders against the company and the directors and others. We shall discuss them hereunder.

1. **Against the Company—Right to rescind the Contract :** You must know that a contract made with the company to purchase shares is an *uberrimae fidei* contract (*i.e.*, a contract based on the utmost good faith). It implies that if a misrepresentation or non-disclosure of a fact renders a statement untrue in a material particular or renders the whole prospectus untrue, the contract is voidable at the option of the aggrieved party. In other words, the subscriber to the shares can file a suit against the company to rescind the contract under the general law of contracts. But you must remember that before this right can be exercised, the following conditions must prevail, namely: (i) The statement must relate to fact; it must not be merely an expression of opinion or an expectation. Further, the statement must not be untrue as conceived by Section 65 (stated earlier). Besides, the statement must be a material one ; (ii) secondly, the shareholders must have actually relied on the statement ; and (iii) lastly, the suit for rescission ought to have been filed within a reasonable time but before the company goes into liquidation.

2. **Against the Directors and others—Right of action for Damages :** The subscribers may institute a suit for damages against those responsible for the issue of the prospectus, in spite of the fact that the contract to purchase shares has been repudiated. This is an action for deceit under the general law [*Derry* v. *Peek* (*1889*) *14 A.C. 337*] and this action can be taken even if the remedy by way of rescission (as against the company) has been lost through laches or negligence or even if the company goes into liquidation.

According to Section 62 (1), directors, promotor or any other persons who are responsible for the issue of the prospectus containing false or untrue information are liable to compensate all those persons who subscribe to the shares on the faith of the prospectus. But the action for damages must be taken within 3 years from the date of the allotment of the shares.

It should be remembered that the abovementioned remedy by way of rescission and damage will not be available to person if he has not purchased the shares on the basis of the prospectus. A person cannot be said to have bought shares on the basis of the prospectus, if he has done so from an existing shareholder or from the share market ; therefore, in these circumstances he cannot bring an action for deceit against the directors (*Peek* v. *Gurney*).

Defence available [Section 62 (c)] : A person who is held liable for the issue of a prospectus containing an untrue statement as a director will be exonerated from such a liability if he can show :

(i) that he (having consented to become a director) had withdrawn his consent to become a director before the issue of the prospectus and that is was issued without his authority or consent :

(ii) that the prospectus was issued without his authority or consent; and that on becoming aware of its issue, he forthwith gave reasonable public notice of the issue having been made without his knowledge or consent; or

(iii) that after the issue of the prospectus and before allotment thereunder he, on becoming aware of any untrue statement therein, had withdrawn his consent and given a reasonable public notice of the withdrawal and of the reasons therefor; or

(iv) (a) that he had reasonable ground to believe and, until allotment, did believe that the statement was true. This provision pertains to the untrue statement not purporting to have been made on the authority of an expert or of a public official document or statement;

(b) that the untrue statement, purporting to be a statement by an expert or contained in a report or valuation of an expert was a correct and fair representation of the expert's statement and he had reasonable ground to believe and, until issue of prospectus, did believe that the expert was competent to make it and the expert had given and had not withdrawn his consent to the issue of the prospectus, and had not withdrawn it before delivery of a copy of the prospectus for registration; and

(c) that the untrue statement, arising from the statement made by an official person or from the public official documents was a correct and fair representation or correct copy or correct and fair extract of the document.

An expert who would be liable by reason of having given his consent under Section 58 to the issue of the prospectus containing a statement made by him would not be liable if he can prove:

(i) that having given his consent to the issue of the prospectus, he withdrew it in writing before the delivery of a copy of the prospectus for registration; or

(ii) that after the delivery of a copy of the prospectus for registration but before allotment, he on becoming aware of the (untrue statement) withdrew his consent in writing and gave reasonable public notice thereof and the reasons therefor; or

(iii) that he was competent to make the statement and he had reasonable ground to believe, and did up to the time of allotment of the shares or debentures believe, that the statement was true [Section 62 (3)].

N.B. The defence under (i) is available only to director; defences under (i), (ii), (iii) & (iv) to all persons mentioned in Section 62 (1) (a) to (d) and the defence under Section (62) (3) is available only to an expert.

Right of Directors and Expert to Indemnity [Section 62 (4)]: Where the prospectus names any person as a director (or as having agreed to become a director) and he (i) has not consented to become a director; or (ii) has withdrawn his consent before the issue of the prospectus and has not authorised or consented to its issue, then (i) the directors of the company (excluding those without whose knowledge or consent, the prospectus was issued) and (ii) any other person who authorised its issue are liable to indemnify the person so named (as a director)

or whose consent was required against all damages, cost and expenses which he may incur, consequent upon his name being included or consent thereto being accorded.

The expert can also claim indemnity against the persons aforementioned in cases where (i) he has not given the consent or (ii) he has withdrawn his consent before the issue of the prospectus and in spite of this fact his consent to its issue is mentioned in the prospectus as required under Section 58.

Criminal Liability for Mis-statements in Prospectus (Section 63): Apart from the liability to compensate shareholders who have suffered a loss due to untrue statement in the prospectus, directors and other persons responsible for the issue of the prospectus may also render themselves punishable with imprisonment for a term which may extent to two years or with fine up to five thousand rupees, or with both. That is so say, every person who had authorised the issue of the prospectus containing an untrue statement is *prima facie* guilty of criminal offence under Section 63 of the Act. However, such persons may plead that the statement was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement was true in order to exonerate themselves from this criminal liability.

Penalty for fraudulently including persons to invest money: Under Section 68, any person who, by making (knowingly or recklessly) any false, deceptive or misleading statement, promise, *etc.*, or by dishonest concealment of material facts, induces another person to enter into

(i) an agreement for the acquisition, disposal, subscribing or underwriting of shares or debentures, or

(ii) an agreement for securing any profit to any of the parties from the yield of shares or debentures or from the fluctuations in the value of shares or debentures

shall be punishable with imprisonment up to 5 years or fine up to Rs. 10,000 or with both.

Personation for Acquisition of Shares: Under Section 68A, the following acts are punishable with imprisonments for a term extending to five years, *viz.*, (a) making an application to a company for acquiring or subscribing for its shares therein under a fictitious name ; or (b) including a company to allot or register any transfer of shares therein to him or any other person in a fictitious name.

It is obligatory for every company to prominently state the foregoing provisions in every issue of a prospectus as well as in the forms or application for shares.

Offer for Sale or Prospectus by Implication: It was at one time possible for a company to evade the statutory provisions relating to prospectus by allotting its shares or debentures to one or more persons so that such allottee or allottees should sell all or any of these shares or debentures to the public. Such a transfer was not considered as a sale to the public and no documents offering the securities were issued by the company. The exemption for such a practice does not exist any more. Section 64 (1) provides :

"Where a company allots or agrees to allot any shares in, or debentures of, the company with a view to all or any of these shares or debentures, being offered for sale to the public, any document by which the offer for sale to the public is made, shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectuses and as to the liability in respect of statements in and omissions from prospectuses, or otherwise relating to prospectuses, shall apply with the modifications specified in sub-sections (3), (4) and (5) and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the documents or otherwise in respect thereof".

Such a document under Section 64 (2) shall be treated as a prospectus (unless the contrary is proved where : (a) an offer of all or any of the securities for sale to the public was made within six months after the allotment or agreement to allot ; or (b) at the date when the offer for sale to the public was made, the company had not received the whole consideration in respect of the securities.

Deposits not to be invited without Advertisement : Section 58 A is designed to regulate acceptance of deposits. The Central Government has the power to prescribe, in consultation with the Reserve Bank, the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted either from the public or from the members of the company.

A company shall not by itself or through any other person invite deposits unless it publishes an advertisement including therein a statement showing its financial position. The form and the manner of such an advertisement, the Central Government may prescribe.

The Central Govt. has since prescribed the form and particulars of advertisements. These are : (1) Every company intending to invite or allowing or causing any other person to invite deposits shall issue an advertisement for the purpose in a leading English newspaper and in one vernacular newspaper circulating in the State in which the registered office of the company is situated.

(2) No company shall issue or allow any other person to issue or cause to be issued on its behalf any advertisement inviting deposits, unless the advertisement is issued on the authority and in the name of the Board of Directors of the company, and unless it contains a reference to the conditions subject to which deposits shall be accepted by the company, the date on which the said Board of Directors has approved the text of advertisement, and the following information, namely :—

(a) name of the company :
(b) the date of incorporation of the company ;
(c) the business carried on by the company and its subsidiaries with the details of branches or units, if any ;
(d) brief particulars of the management of the company ;
(e) names, addresses and occupations of the company ;

(f) profit of the company, before and after making provision for tax, for the three financial years immediately preceding the date of advertisement;

(g) dividends declared by the company in respect of the said years;

(h) a summarised financial position of the company as in the two audited balance sheets immediately preceding the date of advertisement;

(i) the amount which the company can raise by way of deposits under these rules and the aggregate of deposits actually held on the last day of the immediately preceding financial year;

(j) a statement to the effect that on the day of the advertisement, the company has no overdue deposits other than unclaimed deposits or a statement showing the amount of such overdue deposits, as the case may be;

(k) a declaration to the effect: (i) that the company has complied with the provision of these rules; (ii) that compliance with these rules does not imply that repayment of deposits guaranteed by the Central Government; and (iii) that the deposits accepted by the company (other than secured deposits), if any, accepted under the provisions of these rules, the aggregate amounts of which may be indicated) are unsecured and ranking *pari passu* with other unsecured liabilities.

(3) An advertisement issued in accordance with this rule shall be valid until the expiry of six months from the date of closure of the financial year in which it is issued or until the date on which the balance sheet is laid before the company in general meeting or where the annual general meeting for any year has not been held, the latest day on which that meeting should have been held in accordance with the provisions of the Act, whichever is earlier, and a fresh advertisement shall be made, in each succeeding financial year, for inviting deposits during the financial year.

(4) No advertisement shall be issued by or on behalf of a company unless, on or before the date of its issue, there has been delivered to the Registrar for registration a copy thereof signed by a majority of the directors on the Board of Directors of the company as constituted at the time the Board approved the advertisement, or their agents duly authorised by them in writing.

For the purpose of this rule, the date of the issue of the newspaper in which the advertisement appears shall be taken as the date of issue of advertisement.

4A. Statement in lieu of Advertisement : (1) Where a company intends to accept deposits without inviting, or allowing or causing any other persons to invite such deposits, it shall, before accepting deposits, deliver to the Registrar for registration a statement in lieu of advertisement containing all the particulars required to be included in the advertisement by virtue of sub rule (2) of rule 4 and duly signed in the manner provided in sub-rule (4) of that rule.

(2) A statement delivered under sub-rule (1) shall valid until the expiry of six months from the date of closure of the financial year in which it is so delivered or until the date on which the balance sheet is laid before the

company in general meeting, or, where the annual general meeting for any year has not been held, the latest day on which that meeting should have been held in accordance with the provision of the Act, whichever is earlier.

Deposits, accepted prior to 1-2-75 but in accordance with the direction of the Reserve Bank made under Chapter III B of the Reserve Bank of India Act, 1934, may be renewed if they are such that these could have been accepted if the rules to be made by the Central Government were in force. If the deposits are not renewed, they shall be repaid according to their terms. In case any such deposit was accepted in transgression of the Reserve Bank's directions, it shall become refundable.

The Central Govt. has since made rules regarding acceptance of deposits by companies Rule (3). There are: (1) On and from the commencement of these rules :

(a) no company shall accept any deposit which is repayable on demand or on notice or repayable after a period, or

(b) renew any such deposits accepted by it whether before or after such commencement,

(c) except where such deposit is repayable after the expiry of six months but not later than 36 months from the date of acceptance or renewal of such deposits ;

Provided that a company may, for the purpose of meeting any of its short-term requirements for funds, accept or renew deposits for repayment earlier than six months from the date of deposit or renewal, as the case may be, subject to the conditions that such deposits (i) shall not exceed ten percent of the aggregate of the paid-up share capital and free reserves of the company ; and (ii) are repayable not earlier than three months from the date of such deposit or renewal thereof, as the case may be.

Provided further that where a company has before April, 1, 1978, accepted any deposit repayable after a period of more than 36 months, such deposits shall, unless renewed after the said date, be repaid in accordance with the terms of such deposits.

(2) On and from the commencement of these rules no company shall accept :—

(i) Any deposit against an unsecured debenture or any deposit from a shareholder or any deposit guaranteed by any person who, at the time of giving such guarantee, is a director of the company, if the amount of any such deposit together with the amount of such other deposits of all or any of the kinds of deposits referred to in the clause and outstanding on the date of the acceptance or renewal of such deposits exceeds *fifteen per cent* (including any deposit accepted under the proviso to sub-rule (i) of Rule (3) of the aggregate of the paid-up share capital and free reserves of the company: Provided that for the purpose of calculation of the amount of deposits outstanding on the date of such acceptance or renewal, any deposits guaranteed by a

person who, at the time of giving such guarantee, was the managing agent or secretaries and treasurers of the company, and outstanding on such date shall be taken into account ;

Provided further that with effect from April, 1, 1979, this clause (i) shall be subject to the modification that for the words "fifteen per cent" the words "ten per cent" shall be substituted, and where the aggregate of such deposits of a company outstanding on April 1, 1979, exceeds 10% such company shall bring down the deposits to the limit of 10% on or before April, 1, 1980.

(ii) any other deposits, if the amount of such deposits together with the amount of such other deposit other than any of the deposits referred to in clause (i) outstanding on the date of acceptance or renewal, exceeds twenty-five percent of the aggregate of the paid-up share capital and free reserve of the company.

It may be noted that all the provisions discussed under (2) above will be replaced by the following provisions with effect from April 1, 1980.

(2) On and from April 1, 1980, the company shall not accept or renew any deposit, if the amount of any such deposit together with the amount of such other deposits, already received and outstanding on the date of receipt or renewal of such deposit, exceeds 25% of the aggregate paid-up share capital and free reserves of the company.

(3) If, immediately before the commencement of these rules, the aggregate amount of deposits of the nature referred to clause (i) of sub-rule (2) accepted by a company before such commencement, exceeds the limit specific in the said clause (i), the company shall, on or before the 31st day of December, 1975 bring down the deposits to the limit aforesaid and for this purpose the company shall repay such deposits as may be necessary.

Provided that if the Central Government is satisfied that a mortgage or a pledge carried by a compay is not in the public interest, it may declare that the loan creating such mortgage or pledge shall be deemed to be a deposit for the purposes of this rule.

For the purpose of this rule in arriving at the aggregate of the paid up share capital and free reserves of a company, these shall be deducted from the aggregate of the paid-up share capital and free reserves as appearing in the latest audited balance sheet of the company, the amount of accumulated balance of loss balance of deferred revenue expenditure and other intangible assets, if any, as disclosed in the said balance sheet.

(4) On and from April 1, 1978, where a company has any outstanding loans which were exclude from deposits as it stood immediately before April 1, 1978, then such company shall, before April 1, 1981, repay or bring such loans to an amount which, along with other outstanding deposits, is within the limits specified in Rule 3.

[N.B. The above-mentioned provisions of Rule 3 are based on the Companies (Acceptance of Deposits) Amendment Rules, 1978].

Maintenance of liquid Assets [Rule 3 A, added by the Companies (Acceptance of Deposits) Amendment Rule, 1978[. Every company shall, before April 30 of each year, deposit or invest (as the case may be) a sum which shall not be less than 10% of the amount of its deposits maturing during the year ending on March 31 next following, in any one or more of the following methods, *viz.* (a) in a current or other deposit account with any scheduled bank, free from any charge or lien ; (b) in unencumbered securities of the Central Govt. or any State Govt. ; and (c) in unencumbered securities mentioned in clauses (a) to (d) and (ee) of Section 20 of the Indian Trusts Act, 1882. It may be noted that the securities mentioned in this paragraph shall be reckoned at their market value.

The amount so deposited or invested (as the case may be) as stated in the preceding paragraph, shall not be utilised for any purpose other than for repayment of deposits maturing during the year mentioned above, provided that the amount remaining deposited or invested shall not at any time fall below 10% of the amount of deposits maturing until March 31 of the year.

Where deposits are accepted by a company in violation of rules made by the Central Government, repayment thereof shall be made by the company within 30 days. But this time of refund may be extended by the Central Government on sufficient cause being shown, but not beyond another 3 days.

In case the repayments are not made in the manner indicated above, every officer in default is punishable with imprisonment for a term extending up to 5 years as also with a fine. The company is also liable to be punished with a fine equal to twice the amount not refunded. If the fine is realised then the Court shall pay the unrefunded deposit to the depositor and with that the company's liability to the depositor comes to an end.

Apart from this, sub-section (6) levies penalties on the company for accepting or inviting deposits in contravention of the rules to be made by the Central Government. If the contravention relates to the acceptance of deposit, the amount of fine is equal to, or more than, the amount of the deposit so accepted. But in the case of invitation of any deposit in contravention of the said rules, the minimum amount of fine is at least Rs. 5,000 and the maximum limit is Rs. 1 lakh. Besides, every officer of the company who is in default shall be punishable with imprisonment for a term extending up to 5 years and also with fine.

The provisions of Section 58A shall not apply to a banking company, or such other company as the Central Government may, after consultation with the Reserve Bank specify in this behalf.

According to sub-section (8) added anew to Section 58A by the Companies (Amendment) Act. 1977, which came into force from the 24th December, 1977, the Central Government may, if it considers it necessary for avoiding any hardship or for any other just and sufficient reason, by order, issued either prospectively or retrospectively from a date not earlier than the commencement of the Companies (Amendment) Act, 1974, grant extension of time to a company or class of companies to comply with or exempt and company or class of companies from all or

any of the provisions of this section either generally or for any specified period, subject to such conditions as may be specified in the order :

Provided that no order under this sub-section shall be issued in relation to a class of companies except after consultation with the Reserve Bank of India.

According to the Explanation of Section 58A, the term "deposits" means any deposit of money with and includes any amount borrowed by a company ; but it shall not include such categories of amount as have been prescribed in consultation with the Reserve Bank.

Thus the term "Deposit" means any deposit of money with and includes any amount borrowed by a company, *but does not include*—

(i) any amount received from the Central Government or a State Government or any amount received from any other source and whose repayment is guaranteed by the Central Government or a State Government or any amount received from a local authority or a foreign Government or other foreign citizen, authority or person.

(ii) any amount received as loan from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution modified by the Central Government under Section 51 of the Banking Regulation Act, 1949 (10 of 1949), or a corresponding new Bank as defined in clause (d) of Section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or from a cooperative bank as defined in clause (bii) of Section 2 of the Reserve Bank of India Act, 1934 (2 of 1934) ;

(iii) any amount received as a loan from the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948 (15 of 1948), or from a State Financial Corporation established under the State Financial Corporation Act, 1951, (63 of 1951), or from the Shipping Development Fund Committee constituted under Section 15 of the Merchant Shipping Act, 1958 (44 of 1958), or from the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or from the Industrial Development Bank of India established under the Indastrial Development Bank of India Act, 1964 (18 of 1964), or from an Electricity Board constituted under the Electricity (Supply) Act, 1948 (54 of 1948) or from the Life Insurance Corporation of India continued under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956), or from the Rehabilitation Industries Corporation of India Limited or the State Trading Corporation of India Limited or the Minerals and Metals Trading Corporation of India Limited or the Rural Electrification Corporation Limited or the Agricultural Finance Corporation Limited or the Industrial Reconstruction Corporation of India Limited or the Industrial Credit and Investment Corporation of India Limited or the National Industrial Development Corporation of India Limited or the Tamil Nadu Industrial Development Investment

Corporation Limited or the State Industrial and Investment Corporation of Maharashtra Limited or from any other public financial institution which may be notified by the Central Government in this behalf in consultation with the Reserve Bank of India ;

"and Investment Corporation of Maharashtra Limited or from the General Insurance Corporation of India and its subsidiaries, namely, the National Insurance Company Limited, the New India Assurance Company Limited, the Oriental Fire and General Insurance Company Limited and the United Fire and General Insurance Company Limited or from the Gujarat Industrial Investment Corpn. Limited or from any financial company wholly owned by the Central Government or State Government or from the Oil Industry Development Board of from Housing Development Finance Corporation Limited or from any other financial company or public financial institution which may be notified by the Central Government in this behalf in consultation with the Reserve Bank of India."

(iv) any amount received by a company from any other company ;

(v) any amount received from an employee of the company by way of security deposit ;

(vi) any amount received by way of security or as an advance from any purchasing agent, selling agent, or other agents in the course of or for the purposes of the business of the company or any advance received against order for the supply of goods or properties or for the rendering of any service ;

(vii) any amount received by way of subscriptions to any shares, stock, bonds or debentures [such bonds or debentures as are covered by sub-clause (x)], pending the allotment of the said shares, stock, bonds or debentures and any amount received by way of calls in advance on shares, in accordance with the articles of association of the company so long as such amount is repayable to the members under the articles of association of the company ;

(viii) any amount received in trust or any amount in transit ;

(ix) any amount received from a person who, at the time of receipt of the amount, was a director of the company or any amount received from its shareholders, by a private company, or by a private company which has become a public company under section 43A of the Act and continues to include in its Articles of Association provisions relating to the matters specified in clause (iii) of sub-section (1) of Section 3 of the Act.

Provided that the director or shareholders, as the case may be, from whom the money is received furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting from others.

Explanation : For the removal of doubts, it is hereby declared that any deposits received or renewed by a company before the commencement the Companies (Acceptance of Deposits) Amendment Rules, 1978, shall continue to be governed by the rules applicable at the time of such deposit or renewal, as the case may be ;

(x) any amount raised by the issue of bonds or debentures secured by the mortgage of any immovable property of the company or with an option to convert them into shares in the company provided that in the case of such bonds or debentures secured by the mortgage of any immovable property, the amount of such bonds or debentures shall not exceed the market value of such immovable property.

Definition : (i) "Financial company" means a non-banking company which is a financial institution within the meaning of clause (c) of Section 45 I of the Reserve Bank of India Act, 1934 (2 of 1934) ;

(ii) "Free reserves" includes the balance in the share premium account capital and debenture redemption reserve and any other reserves shown or published in the balance sheet of the company and created by appropriation out of profits of the company, but does not include the balance in any reserve created ;

(a) for repayment of any future liability or for depreciation in assets or for bad debts.

(b) by the revaluation of any assets of the company.

By the newly introduced Section 58B, the provisions of this Act relating to prospectus shall, so far as may be, apply to an advertisement referred to in Section 58A.

The following are the other rules framed by the Central Government in consultation with the Reserve Bank.

Form of Application for Deposits : (1) On and from the commencement of these rules, no company shall accept or renew any deposit unless an application is made by the intending depositor for the acceptance of such deposit and such application contains a declaration by such person to the effect that the amount is not being deposited out of the funds acquired by him by borrowing or accepting deposits from any other person.

(2) The application referred to in sub-rule (1) shall be made in the form supplied by the company and such form shall be accompanied by a statement by the company containing all the particulars specified in sub-rule (2) of rule 4 and incorporating therein all changes in relation to such particulars up to the date on which the form is issued by the company.

Furnishing of receipt to depositors : (1) Every company shall, on the acceptance or renewal of a deposit, furnish to the depositor or his agent, a receipt for the amount received by the company.

(2) The deposit receipt referred to in sub-rule (1) shall be signed by an officer of the company duly authorised by the company in this behalf and shall state the date of deposit, the name and address of the depositor, the amount

received by the company as deposit, the rate of interest payable thereon and the date on which the deposit is repayable.

Register of Deposits : (1) Every company accepting deposits shall keep at its registered office one or more registers in which there shall be entered separately in the case of each depositor the following particulars, namely :—(a) name and address of the depositors ; (b) date and amount of each deposit ; (c) duration of the deposit and the date on which each deposit is repayable ; (d) rate of interest ; (e) date or dates on which payment of interest will be made ; (f) any other particulars relating to the deposit.

(2) The register or registers referred to in sub-rule (1) shall be preserved in good order for a period of not less than eight calendar years from the financial year in which the latest entry is made in the register.

General Provisions Regarding Repayment of Deposits : (1) Where a company makes repayment of deposit after the expiry of a period of six months from the date of such deposit but before the expiry of the period for which such deposit was accepted by the company, the rate of interest pavable by the company on such deposit shall be reduced by two per cent from the rate at which the company would have paid had the deposit been accepted for the period for which such deposit had run and the company shall not pay interest at any rate higher than the rate as so reduced.

Provided that nothing contained in this rule shall apply to the repayment of any deposit before the expiry of the period for which such deposit was accepted by the company if : (i) such repayment is made solely for the purpose of complying with the provisions of (a) the Non-Banking, Non-Financial Companies (Reserve Bank) Directions, 1966 or (b) Rule 3 ; or (c) for conversion, with the consent of the depositors of deposits into secured debentures in accordance with the guidelines issued by the Govt. of India, from time to time regarding the issue of rights debentures.

Where the period for which the deposit had run contains any part of a year then if such part is less than 6 months it shall be excluded and if such part is six months or more, it shall be reckoned as one year, for the purposes of this rule.

Power of Central Government to Decide Certain Question : If any question arises as to whether these rules are or are not applicable to a particular company, such question shall be decided by the Central Government in consultation with the Reserve Bank of India.

Return of deposits to be filed with the Registrar : (1) Every company to which these rules apply, shall, on or before 30th June of every year, file with the Registrar, a return in the form annexed to these rules furnishing the information contained therein as on 31st March of the year duly certified by the auditor of the company.

(2) A copy of the return shall also be simultaneously furnished to the Reserve Bank of India.

Self-Examination Questions

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper. The answers to these questions are

not required to be written out and submitted for evaluation. (Answers are given at the end.)

1. Can a company vary the terms of a contract in the prospectus ?
2. Are the following conditions contained in the prospectus valid :
   (a) a condition that the applicant for shares or debentures must waive any of the statutory requirements relating to the prospectus ;
   (b) a condition which, in effect, affects the applicant with the notice of any contract, document or matter not specifically referred to in the prospectus ?
3. What are the rights of the applicant for shares or debentures (i) against the company (ii) against the directors and others ?
4. Is there any limitation period for bringing an action against directors on ground of mis-statement contained in the prospectus ?
5. One person bought shares from an allottee who became the shareholder in pursuance of the prospectus and another person bought shares from the share market. Later on, both of them come to know that the relative prospectus contained culpable mis-statement. Would they have any remedy either against the company or against the directors ?

Allotment of shares : Before we deal with the statutory restrictions in this regard, it will be worthwhile to understand the meaning of the term 'allotment'. As you know, the intending subscribers send, in reply to the prospectus issued by the company, applications to the company. These applications are mere offers to take shares, since the prospectus is just an invitation to make offer. Allotment is the acceptance by the company of such offers to take shares. It is an appropriation of shares to an applicant for shares—an appropriation out of the unappropriated capital of the company. That is why, if the shares which have been forfeited are reissued, you cannot call it an "allotment". The word "allotment" gives us the notion of a "lot". Therefore, there must first be a lot of shares, then the division of them into value or classes and lastly allocation of them among various applicants [*Calcutta Stock Exchange Association, In re, 61 C.W.N 418=1957 Cal. 438*].

We shall now discuss the restrictions imposed by the Act on the allotment of shares. They all relate to the first allotment.

Restrictions : Section 69 of the Act provides that no allotment shall be made of any shares of a company offered to the public for subscription, unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors, must be raised by the issue of share capital in order to provide for the matters specified in Clause 5 of the Second Schedule to the Act has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company, whether in cash or by a cheque. The minimum subscription stated in the prospectus must be reckoned exclusively of any amount payable otherwise than in cash. The amount payable on application on each share must not be less than five per cent of the nominal amount of the shares. All moneys received from applicants for shares are required to be

deposited in a scheduled bank until the certificate to commence business is obtained.

If the above-mentioned conditions are not fulfilled within 120 days after the first issue of the prospectus, all moneys subscribed may be refunded without interest within 10 days thereafter. If the money is not so refunded then the directors shall be jointly and severally liable to repay it with interest @ 6% per annum from the expiration of the 130th day.

2. Further, it may be recalled that no public company having a share capital which does not issue a prospectus or which does not proceed to allot shares in pursuance thereof shall be entitled to allot any of its shares unless a statement in lieu of prospectus is filed with the Registrar at least three days before the first allotment in terms of Section 70 of the Act.

3. Shares cannot be allotted immediately after the prospectus is issued. A period of 4 days, or such longer period as is mentioned in the prospectus, must be allowed to pass since its issue. Moreover, where, after a prospectus is first issued generally, a public notice has been given by some person (responsible under Section 62) so as to exclude, limit, or diminish his responsibility, then the shares cannot be allotted until the beginning of the 5th day after the date on which such public notice was given. The reason for the prescription of this period of 5 days is to enable the public to digest the contents of the prospectus as also to obtain independent advice to form a judgment before they could stake their money. An application of shares is not revocable until the end of the 5th day from the opening of the subscription list (Section 72).

4. Suppose, the prospectus states that application has been or will be made for permission for the shares or debentures offered for subscription to be dealt in on one or more recognised stock exchanges. In such a case, prospectus shall state the name of stock exchange, or as the case may be, each stock exchange. Also in such a case, the permission must be applied before the 10th day after the first issue of the prospectus; if the permission has not been so applied for, the allotment, whenever made, shall be void. But if the permission has not been granted by the stock exchange, the allotment made before the expiry of 10 weeks from the date of the closing of the subscription lists shall become void [Section 73 (1)] as amended by the (Amendment Act of 1974). Further, a proviso has been added anew according to which, if an appeal has been preferred against the decision of any recognised stock exchange refusing the aforesaid permission for enlistment under Section 22 of the Securities Contract (Regulation) Act, 1956, such allotment shall not be void until the dismissal of the appeal. On the allotment being void under Section 73, the any interest. If the application money received must be refunded to the applicants forthwith without money is not refunded within 8 days after company becomes liable to refund it, the money will bear interest @ 12% from the expiry of the 8th day.

It may so happen that the permission has been granted by the recognised stock exchange for dealing in shares or debentures in such stock exchange or each stock exchange and that the moneys received from applicants for shares or debentures are in excess of the aggregate of the application moneys relating to

the shares or debentures in respect of which allotments have been made. In such a situation, the company shall repay the moneys to the extent of such excess forthwith without interest But if such moneys are not repaid within 8 days the company becomes liable to pay it, then the directors of the company shall jointly and severally be liable to repay the money with interest @ 12% p.a. from the expiry of the 8th day. However, the director shall be exonerated from this joint and several liability if he can prove that the default in the repayment of the moneys was not due to any misconduct or negligence on his part [sub-section (2-A) as inserted anew to Section 73 by the Companies (Amendment) Act, 1974]. If default is made in complying with these provisions then the company and every officer of the company who is in default shall be punishable with fine extending up to Rs. 5,000 and where repayment is not made within 6 months from the expiry of the 8th day also with imprisonment for a term which may extended to one year [sub section (2B) added anew].

All moneys received as application or allotment moneys shall be kept in a separate bank account maintained with a scheduled bank "until the permission has been granted or where an appeal has been preferred against the refusal to grant permission, until the disposal of the appeal, and the moneys standing in such separate account shall, where the premission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2)". If default is made in complying with this sub-section, then the company and every officer of the company who is in default shall be punishable with fine extending up to Rs. 5,000 [sub-section (3) as amended by the Amendment Act of 1974].

Moneys standing to the credit of the separate bank account referred to in sub-section (3) above shall not be utilised for purpose other than either of the following purpose namely—(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on stock exchanges of shares, where exchange specified in the prospectus, (b) repayment of moneys recieved from applicants in pursuance of the prospectus, where shares have not been permitted to be dealt in on the stock exchanges or each stock exchange specified in the prospectus, as the case may be, or where the company is for any other reason unable to make the allotment of shares [sub-section (3A) added anew by the said Amendment Act].

It shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in sub-section (1) above [Sub.section (5) as amended in 1974].

In *Union of India* v. *Allied Industrial Products Ltd.* (*1974*) *71 Comp. Cas. 127* (*S. C.*)., the Supreme Court held that if the stock exchange had intimated that it would give further consideration to an application, the time-limit contemplated by Section 73 would not operate. It was held that if any of the stock exchanges mentioned in the prospectus approved the application for enlistment, it would mean sufficient compliance with the provisions of Section 73 and the allotment made in pursuance of that prospectus would be valid. This was in 1971. As the

dicision is likely to lead to complication in as much as the investing public as well as underwriting institutions are likely to lose the protection hitherto enjoyed by them, Section 73 has been amended, suitably on the lines indicated above.

Effect of irregular allotment : *What is "irregular allotment"? When the shares are not allotted in pursuance of Sections 69 and 70 (discussed above) such an allotment is known as irregular allotment. In spite of the stringent provisions of Sections 69 and 70, one may find that allotment has been made in utter contravention thereof. The directors may choose to take a chance and proceed to allot shares although minimum subscription has not reached or a prospectus or statement in lieu of prospectus has not been filed. Such an allotment is treated by the Act not as void ab initio but as irregular.*

The applicant for the shares may avoid the allotment, if he does so within the time specified by Section 71, namely, (a) where the allotment was made before the statutory meeting, within 2 months after the holding of statutory meeting of the company and not later ; or (b) where no statutory meeting is required to be held by the company, within 2 months after the date of allotment and not later; or (c) where the allotment was made after the statutory meeting, within 2 months of allotment, and not later.

The allotment shall be voidable as aforesaid, despite the fact that the company is in the course of being wound up.

Within the above-mentioned peroid, the allottee must intimate to the company that he avoids the allotment. If legal proceedings are required to be taken, these need not be within the period of two months provided the notice of avoidance was served on the company within the aforesaid time, but they should be reasonably prompt thereafter if they are required to be brought [*Re National Motor Mail Coach Co. (1908) 2 Ch. 228*].

Furthermore, sub-section (3) of Section 71 marks every director of a company, who knowingly contravenes or authorises the contravention of any of the provisions of Section 69 or Section 70 with respect to allotment, liable to compensate the company and the allottee for any loss, damages or costs which they may have sustained or incurred thereby. But the proceedings for such compensation can only be taken within two years from the date of allotment. As the allotment is only voidable under the Section at the option of the shareholder, the shareholder may keep the share and yet sue the directors who have knowingly contravened either of the two Sections (69 and 70) to compel them to make good the loss to him as a result of the irregular allotment.

Before we conclude our discussion on allotment of shares, we should discuss minimum subscription to which we made a passing reference earlier. While issuing a prospectus, the company mentions in it a certain amount which, the Board of Directors opine, must be raised by the issue of share capital to provide for the matters specified in Clause 5 of Schedule II to the Act. This amount is described as a minimum subscription. The matters which must be statutorily provide for are : (i) the purchase price of property already purchased, or to be purchased which is to be defrayed in whole or in part out of the proceeds of issue ; (ii) any

preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscription for any shares in the company; (iii) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters; (iv) working capital; and (v) any other expenditure, stating the nature and purpose thereof and the estimated amount in each case.

Return of Allotment : The company is duty-bound to submit a report to the Registar within 30 days of allotment of shares. The report is called the return of allotment under Section 75 of the Act. It must be in Form 2 of the Companies (Central Government's) General Rules and Forms, 1956. It must state : (a) the number and nominal amount of the shares allotted ; (b) the names, adresses and occupations of the allottees and the amount, if there be any, paid or due and payable on each share. But the company must not show any shares as having been allotted for each, if cash has not been actually received by it.

In case shares allotted are not bonus shares and allotted as fully or partly paid-up otherwise than in cash, then the company must produce for the inspection and examination of the Registrar certain documents. These documents are; (a) a contract in writing constituting the title of the allottee ; and (b) any contract of sale or contract of service or other consideration in respect of which the allotment was made. These documents must be duly stamped. Also, along with these documents, the company must file with the Registrar : (i) copies of the said contracts after verifying them in the prescribed manner, and (ii) a return stating the number and nominal amount of the shares so allotted, the extent to which they are to be treated as paid-up and the consideration for which they have been allotted. Under Rule 5 of the Companies (Central Government's) General Rule and Forms, 1956, these copies of contracts must be verified by an affidavit of a responsible officer of the company. Where such a contract is not in writing, the company must, within 30 days after allotment, file with the Registrar a document embodying the said particulars of the contract. The document must bear the some amount of stamp duty as would have been payable if the contract had been in writing.

In the case of the issue of bonus shares, the return is required to indicate the number and nominal amount of shares allotted, the names, addresses and occupations of the allottee ; and the resolution authorising the issue of bonus shares. In the case of issue of shares at a discount, the return must be accompanied : (i) by a copy of the company's resolution authorising such an issue, (ii) by copy of the order of the Court which sanctions the issue, and (iii) where the maximum rate of discount exceeds 10% by a copy of the Central Government's order permitting the issue at a higher percentage.

The 30-day period for filing the return is extendable by the Registrar. But the company has to seek this extension by an application either before or after the expiry of this period.

While explaining the meaning of the word 'allotment', we have stated why a re-issue of forfeited shares does not constitute an allotment. In consonance with that reasoning, Section 75 (5) specifically states that the provisions of Section 75 do not apply to such case; thus the question of filing a return in respect of it does not arise.

Self-Examination Questions
[Answers are given at the end]

6. A company has forfeited some shares and re-issued them. Will it be an allotment of shares as conceived by the Companies Act ?
7. What will be the effect of allotment in the following circumstances ?

(a) Where, according to the prospectus, permission for dealing in the shares on a recognised stock exchange is to be sought but has not been sought within the statutory period and the allotment has been made.

(b) Where the application for the aforesaid permission has been duly sought but has not been granted within the statutory period and the allotment has been made.

8. What are the statutory periods for the application of permission and for the actual grant of the permission as aforesaid ?
9. What do you understand by the phrase, "time of opening of the subscription list" ?
10. What is the necessity for keeping the subscription list open for the statutory period ?

Underwriting: The expression 'underwriting' pre-supposes a contract. What is that contract ? Between whom ? What is the consideration therefor ? It is a contract entered into between the company and certain parties (called underwriters) before the shares or debentures are offered to the public for subscription. The contract is that in case the whole or an agreed portion of the shares or debentures are not applied for, then the underwriters will themselves apply for unsubscribed shares or debentures ; alternatively, they will procure persons to apply for them. The company is least concerned with how the underwriters procure the purchasers. Thus, the underwriters expose themselves to a great risk in 'placing' the shares before the public. And in return for this exposure to the risk, the underwriters get commission. The commission is payable on the amount of shares under written. It will be payable even if the underwriters are not ultimately called upon to take up any shares.

The circumstances in which underwriting commission can be paid are as follows :

(i) The payment of commission should be authorised by the articles.

(ii) The amount of commission paid or agreed to be paid should not exceed in the case of shares 5% of the price at which the shares have been issued or the amount or rate authorised by the articles whichever is

less ; and in the case of debentures 2-1/2% of the price at which debentures have been issued or the amount or rate authorised by the articles, whichever is less.

(iii) The amount or rate per cent of the commission paid or agreed to be paid should be disclosed in the prospectus (in the case of shares or debentures offered to the public for subscription) and where no prospectus has been issued, in the statement in lieu of prospectus (or in a statement in lieu of prescribed form signed in the like manner as the statement in lieu of prospectus) and should be filed with the Registrar before the payment of the commission.

(iv) The number of shares or debentures which persons have agreed to subscribe absolutely or conditionally for commission, should be disclosed in the manner aforesaid ; and

(v) A copy of the contract for the payment of the commission should be delivered to the Registrar along with the prospectus or the statement in lieu of prospectus for registration.

Section 76 (4A) clarifies that commission to the underwriters is payable only in respect of those shares or debentures which are offered to the public for subscription. However, where (i) a person, who for a commission has subscribed (or agreed to subscribe) for shares or debentures of a company, and before the issue of the prospectus (or statement in lieu of prospectus) of such shares or debentures, some other person (or persons) has subscribed for any or all of them ; and (ii) such a fact together with the aggregate amount of commission payable to the underwriter is disclosed in such prospectus (or statement in lieu of prospectus), *then the company may pay* commission to the underwriter in respect of his subscription irrespective of the fact that the shares or debentures have already been subscribed.

Financial Assistance of Purchase of Shares : No public company and a private company, which is a subsidiary of a public company can give financial assistance whether by way of loan, guarantee, etc. for the purchase or subscription of its own shares or that of its holding company, unless the subsequent reduction of capital is sanctioned by the Court and is carried out in the way provided by Sections 100 to 104 or Section 402. There are, however, certain exceptions to this rule, namely :- (a) a banking company may lend money for the purpose in the ordinary course of its business but not on the security of its own shares ; or (b) the company in pursuance of a scheme for the purchase of or subscription for fully paid shares of the company (or those of its holding company), to be held by trustees for the benefit of the employees of the company, may advance loan for the purpose ; (c) the company may advance a loan to a person *bona fide* in its employment (other than directors, or managers) to enable them to purchase or subscribe for fully paid shares for an amount not exceeding their salary or wages for a period of six months (Section 77).

By implication an unlimited company can purchase its own shares.

Section 77 (4) provides that if the company or any officer of the company acts in contravention of the foregoing provisions of Section 77 then the company and the officer in default is punishable with fine which may extend to Rs. 1,000.

[But nothing in Section 77 shall affect the right of a company to redeem any of its redeemable preference shares issued under Section 80 or under any corresponding provision in any previous companies law].

Members & Shareholders ; At this stage of your study, you should know the different ways in which you can become a member of a company. But prior to that, we should draw your attention to the fact that in the parlance of Company Law, the two words "member" and "shareholder", are loosely used by common people, thereby giving out the impression that they are *absolutely* synonymous. Such an impression needs to be qualified. You will perhaps recollect that in the preceding Study Paper, you read that company 'limited by guarantee' or a 'limited liability' company might not have a share capital. Obviously, such a company cannot have shareholders ; nonetheless it has members. Conversely, there are cases where, say for example, share warrants have been issued by the company to persons. In such a situation, the bearers of the warrants are shareholders ; but they are not members as their names are srtuck off the registrar of members on the issue of the share warrants in terms of Section 115 (1). The is true so long as the articles of the company do not provide, by virtue of Section 115 (5), that in all or some respects the said bearers would be deemed to be members. From these exceptional instances, we can draw the conclusion that the terms "members", and "shareholders" are, barring a few exceptions, synonymous.

Membership : Section 41 of the Act enables you to become a member of a company by subscribing to the memorandum. The subscriber to the memorandum is deemed to have agreed to become a member of the company, and on its registration, is entered as member in its register of members. The subscriber to the memorandum becomes a member, on registration of the company, even without the shares having been allotted to him, and is liable as a contributory when the company is wound up [*Universal Transport Co.* v. *Jagjit Singh* (*1956*) *Comp. Cas. 36* ; *Babulal* v. *Naraina Sugar Mill* (*1958*) *Comp. Cas. 155*].

Membership can also be had by any other person who agrees in writing to become a member of the company and whose name is entered in its register of members, since in such a case, he is deemed to be a member. Since his agreement needs to be in writing, one cannot be deemed to be a member on ground of estoppel, simply because his name appears in the register of members. Where, however, a person's name is there in the register and he has in fact accepted the position and acted as a member, the agreement will be presumed to be in writing until the presumption is rebutted by proof to the contrary.

A person can also become a member through transfer of shares under Section 108 or by transmission. [*We shall discuss transfer and transmission in Study Paper 3*].

Now a question may arise in your mind, whether a *minor* or a *company* can become a member. It is true that the Act prescribes no qualification for membership. Membership entails an agreement to be a member and this agreement can be enforced in the Court. Therefore, the contractual capacity as envisaged by the Indian Contract Act should be taken into consideration. It has been held in *Mohori Bibi* v. *Dharmadas Ghose (1930) 30 Cal. 539 (P.C.)* that since a minor has no contractual capacity, the agreement with a minor is void. Therefore, a minor or a lunatic cannot enter into an agreement to become a member.

For example, a father applied for shares in a company as guardian of the minor daughter. The company issued shares and registered them in the name of the minor describing her as minor. The transaction was void and the father who signed the application on the minor's behalf could not be treated as having contracted for the shares ; as such he could not be placed on the list of contributories, when the company was wound up [*Palaniappa* v. *Official Liquidator A.I.R. 1942 Mad 470*]. But what will happen if the directors allot shares to a minor in response to his application, without knowing that he was a minor and enter his name in the register of members ? As soon as the company comes to know of this fact, it can eschew the allotment and strike the name of the minor off the register of members. The minor too can rescind the allotment at any time during his minority. But the company must refund the entire money to the minor, which it obtained in relation to the shares allotted. Can the minor be likewise compelled to restore to the company the benefits (if any) received by him from the allotment of shares ? It is a matter for the Court to decide, regard being had to the fact and circumstances of each case.

But as regards the rescission of the contract in point of time, the minor and the company are on a little different footing. Even after attainting majority, the minor can deny his liability on the shares on the ground of minority. But the company cannot successfully impeach the action of the minor's repudiation by setting up the plea that he received the dividend during his minority or that he had made a fraudulent representation of his age in the application [*Sadiq Ali* v. *Jay Kishore, 30 Bomb. L. R. 1346. (I)* ; *P. C. Balangowada* v. *Gadigeppa, 3 Bomb. L.R. 350*]. If, in this illustration, the minor received dividends after he had attained majority, could he be legally allowed to shirk his liability on the shares ? The answer is 'no'. This is because he would be deemed to have intentionally led the company to believe him to be a shareholder and on the faith of such belief to pay him the dividends. Therefore, he would be stopped by this conduct, while being a person *sui juris*, from denying as between himself and the company that he is a shareholder. [*Fazalbhoy* v. *The Credit Bank of India Ltd. 39 Bomb. 331*].

Can a company become a member ? A company can become a member of another company if it is so authorised by its memorandum. But under Section 42 (1), a company, except in certain specified cases, cannot become a member of its holding company. Any allotment or transfer of shares in a company to its subsidiary or a nominee for its subsidiary will be void. But in two cases,

Section 42 (1) will not apply, *viz.*, where, the subsidiary is concerned as the legal representative of a deceased member of the holding company, or where the subsidiary is concerned as a trustee, unless the holding-company or a subsidiary of it is beneficially increased under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of a business including money lending [Section (2)]. A subsidiary which was a member of its holding company at the commencement of the Act or before becoming a subsidiary of the holding company, may continue to be a member. But it shall not, except in two cases mentioned in Section 42 (2) have any voting right at the holding company's meeting.

Before we pass on to the circumstances leading to the termination of membership it is desirable that we should examine the veracity of the following statement, namely—"A contract to take shares in a company is governed by the same rule as any other contract."

There being no difference between a contract to take shares and any other contract, it is not necessary that an agreement to take shares should be formal. If, in substance, an agreement is made, the form is immaterial (*Risto's case, 4 Ch. D. 782*). The only requirement under Section 41 (2) of the Act for person to become a member of the company is to agree in writing.

The same rules, which govern the contract under the law of contracts also apply to a contract to take shares. The intending candidate sends in response to a prospects, his application to the company for such number of shares as he wants to have or as the company may allot to him. It is treated as an offer from the applicant, which needs to be accepted by the company before a binding contract can come into being. The fact of acceptance is then communicated to the applicant through a notice of allotment. [*Polatt's case (1867) L. R. Ch. Appl 527*]. The application for shares or debentures, made in pursuance of a prospectus issued generally, cannot be revoked until after the expiry of the 6th day after the opening of the subscription lists, or the giving, before the expiry of the said 5th day by some person responsible under Section 62 for the prospectus, of a public notice having the effect of excluding, limiting or diminishing the responsibility of that person. The applicant, however, can revoke his application, before the notice of allotment is put in the course of transmission to him, *e.g.* by *post* [*Maclangan's case, (1882) 51 L. J. Ch. 841*; *Wallance's case, (1900) 2 Ch. 671*)]. Mere making over of the notice of allotment to a postman, however, does not constitue its posting [*Re. London & Northern Bank Exp. Jons. (1900) 1 Ch. 210*]. On proper posting of the notice, the contract is complete even if it goes astray [*Harri'scase, (1872) L.R. 7 Ch. App. 587*]. Again, the acceptance must be communicated to the applicant in some way, whether by writing or verbally or conduct ['*Gunn's case, (1867) by L.R. 3 Ch. App. 40*]. Even a notice of allotment brought home to the applicant, not from the company but from elsewhere, will be binding on him [*Wall's case, (1863) L.R. 3 Ch. App. 325*].

Where shares have been applied for prior to the company's incorporation, allotment and notice after incorporation in response to such application constitute

a complete contract. This is because the application operates as a continuing offer and when the company accepts it after incorporation, it matures into a binding contract [*Lawrence's case, (1866) 2 Ch. App. 413 ; Donwens* v. *Ship (1868) L.R. 3 H L. 344*].

The aforesaid application may be either simple or conditional. In the former case, a simple allotment to the applicant with the notice thereof will constitute the agreement.

If it is conditional, the allotment must be made in pursuance of the specified conditions. [*In Re Universal Banking Co. Roger's Case Harrison's case (1858) 3 Ch. App. 633*]. Where it has been made subject to a condition precedent, the applicant becomes a member only when the condition is complied with. But where the application has been made subject to a collateral condition or a condition subsequent, the applicant becomes a member *in presenti*, when he accepts the notice of allotment and his name has been placed on the register of members. Consequently, even if the company goes into liquidation, he cannot escape the liability as contributory, though the condition has not been complied with by the company before that time. He may be entitled to damages against the company for its failure in carrying out the condition [*Elkington's case (1867) 1 Ch. App. 511 Fisher's case (1885) 31 Ch. D 120*]. But since the liability of a contributory arises *ex lege* and not *ex contractu*, he cannot set up the non-fulfilment of the condition as a defence against his statutory liability as a contributory, which is the direct result of his being a member of the company [*Hansraj* v. *Astana 35 Bomb. L.R. 312 (P.G.)*].

Even where an applicant waives notice of allotment or where there is no necessity for such notice, the contract for shares is nevertheless complete and the allottee becomes entitled to the membership of the company.

Besides, according to Section 41, the applicant, by agreeing to take shares, merely agrees to become a member but does not actually become a member ; he becomes a member only when his name is entered on the register of members. [*Nicol's case 39 Ch. D. 421 ; Musselwhite* v. *C.H. Musselwhite & Sons Ltd. (1962) 1 All E.K. 20*].

Further, to decree specific performance of a contract by a person to take or a company to allot shares is well within jurisdiction of the Court [*New Burnswick etc. Land Co.* v. *Muggeridge (1860) Dr. & sm. 363 ; Odessa Tramways Co.* v. *Monde (1878) 8 Ch. D. 235*].

In view of the foregoing discussion it may thus be concluded that the statement that a "contract to take shares in a company is governed by the same rules as any other contract" is fully correct.

Termination of Membership : Membership is terminated when a person's name is removed from the register of members for some proper reason. This may occur when :— (a) he *transfers* all of his shares ; (b) his shares are forfeited, surendered or sold to enforce a lien ; (c) he hold redeemable preference shares and they are redeemed ; (d) he dies and his legal representative *transfers* the shares or secures their registration in his own name ; (e) his contract to take the shares is

rescinded their repudiated ; (f) he becomes insolvent and the Official Assignee or Receiver disclaims the shares or transfer them ; and (g) the shares or held by a company in the course of liquidation ; and the liquidator disclaims the shares or transfer them.

The Registrer of members, however, is only a *prima facie* evidence as to whether a person is a member or not and if a person's name is improperly removed, all his rights and obligations as a member continue to remain the same and he or any aggrieved party may apply to the Court under Section 155 to have the register rectified. The provisions of Section 155 also apply in rectification of the register of debentureholders.

On a member's death, his name remains on the register and his estate continues to be a member until his legal representative takes either of the steps mentioned in clause (d) above. He can receive dividends, notice of meeting but cannot vote ; but the Board can compel him to make an election under clause (d) above. (See Regulation 28, Proviso, Table A of Sch. I.)

Rights of a Member : These are as follows :

(i) To have the certificate of shares held or the certificate of stock issued to him within the prescribed time (S. 113).

(ii) To have his name borne on the register of members as well as to have the register rectified, and in the case of refusal by the company, to apply to the Court for necessary relief (S. 155).

(iii) To transfer shares subject to any restrictions imposed by the articles (S. 82).

(iv) To attend meetings of shareholders, receive proper notice and to vote at the meetings.

(v) To associate in the declaration of dividends and to apply to the Court for an injunction restraining the directors from paying dividend, on an *ultra vires* declaration or out of capital.

(vi) To inspect the registers, indexes, returns and copies of certificates, *etc.* kept by the company and to obtain extracts or copy thereof (S. 16).

(vii) To obtain copies of Memorandum and Articles on request and payment of the prescribed fee (S. 39).

(viii) To have the first option in case of issue of new shares or a further issue of shares (*i.e.*, the right of pre-emption) by the company (S 81).

(ix) To receive a copy of the statutory report [S. 165 (1) & (2)].

(x) To apply to the Court to have any variation or abrogation to his rights set aside by the Court (S. 107).

(xi) To have notice of any resolution requiring special notice [S. 196 (2)].

(xii) To obtain on request minutes of proceedings at general meeting [S. 196 (2)].

(xiii) To remove directors by joining with others (S. 284).

(xiv) To obtain a copy of the profit and loss amount and the balance sheet with the auditor's report (Sections 210, 219).

(xv) To apply for the appointment of one or more competent inspectors by the Govt. to investigate into the affairs of the company as well as for reporting thereon (Section 235, 237).

(xvi) To participate in the appointment of an auditor or auditors at the Annual General Meeting (S. 224).

(xvii) To inspect the auditor's report at the Annual General Meeting of the company (S. 230).

(xviii) To receive a share in the capital of the company and in the surplus assets, if any, on the company's liquidation.

(xix) To particate in passing of the special resolution that the company may be wound up by the Court or voluntarily [Section 433, 484 (1) (b)].

(xx) To participate in appointment and in fixation of remuneration of one or more liquidators in the case of a Members' Voluntary Winding up and to fill any vacancy in the office of a liquidator so appointed by him (Sections 490, 492),

Rule in Foss v. Harbottle and its Exceptions :

When the directors are vested with specific powers by the articles of a company, a majority of members cannot exercise any of those powers though it may approve of the exercise of such powers by the directors on any specific occasion. If in the purported exercise of such powers, any fraudulent act done by the directors results in a loss to the company, then it is the majority shareholders who can complain of or condone such act. In *Foss* v. *Harbottle*, two shareholders of the company sued the directors praying for an order to compel them to make good the loss which the company sustained as a result of the director's fraudulent acts. It was held that since the majority could legally confirm such acts, the Court could not interfere. It was, therefore, left to the majority to complain of or condone the acts as they might think fit. The reason for this rule was that it was for the company to complain by suing the wrong-doer.

"The Rule in *Foss* v. *Harbottle* as I understood it, comes to no more than this : First, the proper plaintiff in action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of members of the company or association is in favour of what has been done, then *Credit questio*". [per *Jenkins L. J. in Edwards* v. *Halliwell (1950) 2 All E.R. 1064*].

The rule in *Foss* v. *Harbottle* also applies to general meetings ; the Court would decline to interfere at the instance of the minority in respect to domestic irregularities and formalities.

The aforesaid rule is not inflexible or universal in character—it is rather subject to exceptions and the exceptions depend very much on the necessity for the Court doing justice. Therefore, action may lie at the instance of a minority :

(i) where the action complained of is *ultra vires* the company or illegal so that there could be no question of the transaction being confirmed by any majority ; (ii) where the act constitutes a fraud on the minority. The reason for this exception is that should the minority shareholders be denied the right to bring an action on behalf of themselves and all others, their grievances will never reach the Court, for the wrongdoers themselves, being in control, are not likely to let the company sue. Thus, a minority shareholder can bring an action to restrain an alteration of the articles which is not made *bona fide* for the benefit of the company as a whole ; (iii) where a resolution is passed by a simple majority for any act needing a special resolution for it to be effective. It may so happen that the company, through its directors, may have broken its own articles by doing, without a special resolution, something which may be done validly only by a special resolution. In the absense of the aforesaid exception, the company can assert that it is the proper plaintiff in any consequent action in which event it would amount to permitting a company in breach of its articles to do *de facto* by ordinary resolution a thing which, as per its articles, can only be done by a special resolution. The aforesaid exception is intended to prevent a simple majority of shareholders from waiving the strict observance of the provisions of the statute or the memorandum and articles of the company [*Halliwell's case*] ; (iv) any act committed by directors intentionally or unintentionally, fradulently or negligently, benefiting themselves at the expense of the company. Thus, in *Daniels* v. *Daniels* (*1978*) 2 *All E.R. 89* a company had only two directors on whose instructions the company sold in 1970 land to the second director for a certain amount. This director sold it in her turn in 1974 for a price much higher than her purchase-price. Thereupon, the minority shareholders brought an action claiming, *inter alia* that the director should pay damages to the company. There was no allegation of fraud. The directors applied for the action to be struck out. It was held that the action should be allowed to proceed because if the facts alleged were true, the directors had benefited themselves at the cost of the company.

All these principles have been followed in a few leading cases in India as well. The *prima facie* rule of the majority is subject to certain exceptions indicated below :

(a) Where the act complained of is *ultra vires* the company ; (b) where the action complained of is a fraud on the minority ; (c) where there is absolute necessity to waive the rule in order that there may not be only denial of justice [per *Rangneker J. in Bajekar* v. *Shinker A.I.R.* (*1934*) *Bom. 243*].

The four exceptions mentioned above are based on judicial precedents. Besides these, under the Companies Act, the minority shareholders are also protected by the various provisions thereof. Such instances are briefly stated below :

(i) Under Section 106, if the capital is divided into different classes of shares, the special rights of each clause may be varied with the consent of the 3/4ths majority of the shareholders of that class. But where this is done and the rights are varied by the requisite majority votes, the holders of not less in the aggregate than 10% of the issued shares of

the affected class [being the persons who did not consent to or vote in favour of the resolution for the variation] may apply to the Court to have the variation cancelled and where any such application is made, the variation shall not be effective unless and until the Court confirms it under Section 107 of the Act.

(ii) Sections 391 and 494 (with which you are not now concerned but will be concerned when you come up to the final stage) of the Act give protection to minority where schemes of reconstruction are carried out. Section 395 too gives protection to dissenting shareholders where another company makes a takeover bid to acquire their shares.

(iii) A minority group which complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to members including himself may apply to the Court, by petition, under Section 398 (with which you will be concerned only when you come up to the final stage). If the Court is of the opinion that the affairs of the company are being conducted in the manner alleged, and that a winding-up order would be unfair to those members, but that otherwise the facts would justify a winding-up order, the Court, with a view to bring to an end matters complained of, make such order as it thinks fit.

(iv) If at least 200 members irrespective of their shareholding or such members as hold at least 1/10th of the total voting power therein think that the affairs of the company require investigation, they may apply to the Central Government under Section 235 for the appointment by the Central Government of inspectors for this purpose.

[**Note** : You will be required to read Section 235 when you pass the Intermediate Examination.]

Liabilities and Duties of a Member :

(i) To take shares, when they are allowed in due time and in compliance with the provisions of the Act, unless the refusal to accept the shares has been sent on the ground of non-compliance with the provisions of the Act as regards the issue of the prospectus or as regards allotment.

(ii) To pay for the shares allotted to him when the allotment is made and when calls have been made validly and in conformity with the provisions of the articles.

(iii) To abide by the doing of the majority of members unless the majority acts vindictively, oppressively, *mala fide* or fraudulently.

(iv) To contribute to the assets of the company in the case of winding up when the shares held are partly paid-up.

(v) Members are severally liable for debts of the company contracted, where its business is carried on beyond the expiry of six months from the date at which its membership is reduced below the legal minimum (*i.e.*, seven members in the case of a public company and two members in the case of a private company). However, such members are

not liable for debts contracted before the expiry of six months. No liability will accrue to those members who are not cognizant of the fact that the business of the company is being carried on with members fewer than the legal minimum (Section 45).

With the extent of knowledge of the company law so far acquired you will now be able to follow the procedures regarding contracts and deeds, investments, seal etc., which we shall presently deal with.

Forms of Contract: You will notice from Section 46 that a company can enter into contracts just like an individual person. Suppose, a contract between private persons requires, for its validity, to be in writing signed by the parties to be charged. A similar contract may be made exactly in the same manner by any person acting under the authority of the company. Such an authority may be express or implied. Such a contract may be varied or discharged by the authorised representative of this company in the same manner as the one by private persons.

Likewise, where a private person can verbally make a legally valid contract, a company can also do so. The same rule will apply in respect of any variance of discharge of such type of contracts.

It is thus evident that a company can enter into *parol contract* when writing is not legally necessary as well as a *written contract* where writing is a 'must'. As a general rule, it is permissible for a company to transact a contract without seal. As long as the contract is made by an expressly or impliedly authorised person on behalf of the company and is signed by him, it would be enough.

Mode of Signing: It may not be important from the examination standpoint, nonetheless, it has a practical importance and hence you should know it. First the company must be made a party to the contract in this way: "Between XYZ Ltd. of the one part and V. M. of the other part". Secondly, the contract on the face of it must show that the signatory is acting for or on account of or on behalf of the company. Specimen — "For and on behalf of the XYZ Ltd.". Where the contract is sealed, it must end with the words: "As witness the common seal of the company and the hand and seal of this day of the year...".

Bill of Exchange and Promissory Note and Hundi: The next important question is whether a company can make, accept, endorse, or issue a bill of exchange, promissory note, hundi can such other. The answer to this query will depend on the conditions laid down in the memorandum. Under Section 47, a bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or enporsed on behalf of the company if drawn, accepted, made or endorsed in the name of, or on account of, or on behalf of, the company by any person acting under its authority, express or implied. It is, however, important to note that unless the person signing the note on behalf of the company makes it clear that he is contracting on behalf of the company only, and not on his own account, he runs the risk of being held personally liable on the instrument signed by him.

Execution of Deeds : According to Section 48, there must be either a general power of attorney or a special power of attorney given to a person by a company to execute deeds on its behalf anywhere in or out of India. This power of attorney, the company must give under its common seal. Thereafter, if the attorney signs the deed under his seal where sealing is required, it will bind the company. Thus, you will have noticed that company's common seal is necessary for giving the power of attorney but not for actual execution of deed on its behalf by such attorney. But it should be remembered that its power of attorney and the scope of its operation are strictly construed ; any person dealing on the basis of such power is put on enquiry though not as to the existence of the special circumstances.

Investment by Company (Section 49) : All investments made by a company on its own behalf are required to be made and held by it in its own name. But this rule is subject to the exceptions discussed hereunder : Where the company has a right to appoint any person(s), or where a nominee(s), has/have been appointed as director(s) of any other body corporate, shares in such body corporate to an amount not exceeding the nominal value of the qualification shares which are required to be held by a director thereof, may be registered or held by such company jointly in the names of itself and of each such person or nominee or in the name of each such person or nominee. A company may hold any shares in its subsidiary in the name or names of nominee or nominees of the company, if and in so far as it is necessary to do so, ensure that the number of the members of the subsidiary does not fall below 2 or 7 (as the case may be). Where a company's principal business is one of buying and selling shares or securities, this restriction, of Section 49 does not apply ; that is to say, an investment company need not hold its investment in its own name.

Section 49 does not stop a company from depositing with a bank which is its banker any shares or securities for collecting dividends or interest payable thereon. The company may deposit with, or hold in the name of the State Bank or a Scheduled Bank (which is the banker of the company) shares or securities for facilitating the transfer thereof ; if within 6 months from such an action of the company no transfer of such shares or securities takes place then at the earliest opportunity after the expiry of 6 months the company must get these shares or securities transferred to it from the bank and again start holding them in its own name. Moreover, a company is not prevented from depositing with or transferring to any person any shares or securities by way of security for repayment of any loan advanced to the company or the performance of any obligation undertaken by it.

The certificate or letter of allotment relating to shares of securities must be in the custody of the company or with the State Bank or a scheduled bank which is the banker of the company. The provision is, however, subject to the provisions discussed above in relation to investment companies, and securities deposited for collection of dividend interest or as security.

If the company does not hold these shares or securities in its own name, it must *maintain a register* in which it must record the nature, value and such other particulars as may be necessary to fully identify the shares or securities in question. It must also mention the bank or person in whose name or custody the shares or securities are held. The register must be kept open for inspection by a member or a debentureholder. At least two hours must be set apart every day for such inspection.

If defaults is made in complying with any provision of Section 49 then the company and every officer in default will be punishable with a fine which may extend up to Rs. 5,000.

Service of Documents : Under Section 51, a document may be served *on a company* or on its officer at the registered office of the company. It must be sent either by post or by leaving it at its registered office. If it is sent by post, it must be either by post under a certificate of posting or by registered post. When a notice has been addressed to the company and served on the directors, it constitutes a good service [*Panabo* v. *Fay and Printed Ltd.* (*1941*) *Ch. 25*]. The articles of a company, which contain the provisions contrary to Section 51 cannot be enforced nor can they limit the mode of service to only one of the modes provided by the statute [*Sadasiv* v. *Gandhi Sewa-Samaj* (*1958*) *Bombay 247*].

A document may be served *on the Registrar* by sending it to him at his office by post under a certificate of posting or by registered post, or by delivering it to, or leaving it for, him at his office (Section 52).

Under Section 53, a company may serve a document on its member either personally or by sending it by post to him to his registered address ; or if he has no registered address in India to the address (if any) within India supplied by him to the company for giving notices to him.

Authentication of Documents : There may be a case, where a company has to authenticate a document or any proceeding. In terms of Section 54, it may be authenticated by being signed by a director, the manager or secretary or other authorised officer of the company. But it need not be under the common seal of the company.

Self-Examination Questions

(Answers are given at the end)

11. How can a person become a member of a company ?

12. Can a minor or a lunatic enter into an agreement to become a member of the company.

13 The directors have allotted shares to a minor without the knowledge of his minority and entered his name in the register of members : (a) Can both the company and the minor rescind the contract ? (b) Can the company be com-

pelled to return the entire money to minor ? (c) the minor be likewise compelled to restore to the company the benefits, if any, recieved by him from the allotment ?

14. A minor, on attaining majority, repudiates the contract. The company contends that he cannot rescind the contract because he received dividends during his minority and dividends apart, he fraudulently represented its age in the application for shares. Who will succeed ?

15. Does the company conform to the same forms of contracts as a private industrial ?

Answer to Self-Examination Questions

1. Yes, only with Central Govt.'s, approval, 2. No ; 3. (i) To repudiate the contract ; (ii) To sue for damages; 4. Yes, 3 years from the date of allotment, 5. No; 6. No; 7. (a) Void; (b) Void ; 8. 10 days after the issue of the prospectus and 4 weeks from the date of the closing of the subscription list respectively; 9. 5 days' period after the publication of the prospectus for keeping the subscription list open; 10. To enable the public to digest the contents of the prospectus and to obtain independed advice before deciding to invest their moneys ; 11. By subscribing to the memorandum, by allotment and by transfer or transmission ; 12. No; 13. (a) Yes; (b) Yes; (c) A matter for the court to decide; 14. Minor; 15. Yes.

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INTPRMEDIATF COURSE (N)

COMPANY LAW

STUDY—III

Contents : Concept of Capital—Nature of Shares—Kinds of Share Capital—Voting Rights of a Member—Further issue of Capital (Rights Shares) (Section 81)—Conversion of Shares into Stock—Alteration of Share Capital—Reduction of Share Capital—Liability of Members in Respect of Reduced Shares—Reduction of Shares—Captial vs. Diminution of Share Capital—Issue of Shares at a Premium—Implications of a Share Certificate —Duties of the Companies as to Share Certificates—Calls on Shares—Transfer of Shares—Power to Refuse Registration and Appeal Against Refusal—Forged Transfers—Forfeiture and Surrender of Shares—Capitalisation of Profits—Debenture—Registration of Charges—Register of Charges.

Prescribed Readings :

1. Lectures on Company Law, *by S.M. Shah* (18th Edition).
2. Principles of Company Law, *by M.C. Shukla & S.S. Gulshan* (1977 Edition).
3. Indian Company Law, *by Avtar Singh* (IV Edition).

Concept of capital: The term 'Capital' has a variety of meanings. It means one thing to economists, one to accountants and still another to businessmen and lawyers. In relation to a company limited by shares, the word 'Capital' means share capital, i.e., the capital or figure in terms of so many rupees divided into shares of fixed amount; in other words, the contributions of persons to the common stock of the company form the capital of the company. The proportion of the capital to which each member is entitled, is his share. A share is not a sum of money; it is rather an interest measured by a sum of money and made up of various rights contained in the contract.

In the domain of Company Law, the term 'capital' is used in the following sense:(—)

(a) **Nominal or authorised or registered capital:** It is the sum stated in the memorandum as the capital of the company with which it is to be registered being the maximum amount which it is authorised to raise by issuing shares, and upon which it pays the stamp duty. It is usually fixed at the amount which, it is estimated, the company will need, including the working capital and reserve capital, if any.

It is worthy of note that Section 148 provides for the compulsory publications of subscribed as well as paid-up capital in the company's papers and documents, if these contain a statement of the amount of the authorised capital. A default in this regard is punishable with fine, extending up to Rs. 1,000/.

(b) **Issued capital:** It is that part of authorised capital which is offered by the company for subscription. Where a company does not issue a part of its authorised capital for subscription, the whole of it shall be deemed to have been issued for subscription.

Part I of Schedule VI has made it obligatory for a company to disclose its issued capital in the balance sheet.

(c) **Subscribed capital:** It is the nominal amount of shares taken up by the Public. Where any notice, advertisement or other official communication or any business letter, bill head or letter paper of a company states the authorised captial, the subscribed and paid-up capital must also be stated in equally conspicuous characters (Section 148).

(d) **Called-up capital:** It is the total amount called up on the shares issued. Paid-up capital is the total amount paid or credited as paid up on shares issued. It is equal to called-up capital less calls in arrears.

(e) **Reserve capital:** It represents that part of the uncalled capital which, by a special resolution has been declared to be incapable of being called up except on a winding up of the company. It is the amount which the company has resolved to set apart for meeting a contingency arising in the course of the winding-up of the company. It cannot be dealt with in any manner under a power in its memorandum or articles, nor can it be converted into ordinary capital without leave of the Court. It being reserved for meeting liabilities of the company, it is also referred to as "reserve liability" (Section 99).

But the expression "capital reserve" does not include any amount regarded as free for distribution through the profit and loss account. Any reserve other than a capital reserve shall be "revenue reserve" [Vide Part III, Schedule VI, 7(1)(c)].

Capital reserves comprise profits that arise in special circumstances and are connected with special circumstances. A few examples of these are given below :—

(i) Profit prior to incorporation ;
(ii) Profit on acquisition of business, that is, where the value of assets acquired is more than the liabilities taken over and the purchase consideration ;
(iii) Profit on sale of fixed assets, the excess of sale proceeds over the original cost ;
(iv) Premium on issue of debentures ;
(v) Profit on redemption of debentures ;
(vi) The credit to the capital Redemption Reserve Account (for redemption of redeemable preference shares);
(vii) Premium on issue of shares ; and
(viii) Profit remaining on re-issue of forfeited shares.

Some of the capital profits may ultimately become available for dividend on the fulfilment of certain conditions. These conditions are that profits have been realised in cash and that they remain on a fair revaluation for assets and that the articles do not forbid the utilisation of such a profit for distribution of dividends (*Foster v. New Trinidad Lake Asphalte Co. and Lubbock v. British Bank of South America*). It is possible, therefore, that a profit may be a capital later to become a revenue profit.

(f) **Equity capital :** All share capital which is not preference share capital is equity capital. (What is a preference share capital, we shall discuss later).

(g) **Loan or debenture capital :** It is the money that a company borrows on the security of its debentures. It is not capital in the true sense, it being a debt due from the company in respect of which the company might or might not have created a charge on its assets. The debenture-holders or persons who have advanced loans are creditors and are not members of the company. The loans so raised are described as a capital only on the consideration that these, not being repayable for some length of time, can be regarded as of a permanent character which is one of the attributes of the capital.

Nature of shares : A share means a share in the share capital of company and includes stock except where a distinction between stock and shares is expressed or implied [Section 2(46)]. A share thus represents such proportion of the interest of the shareholders as the amount paid up thereon bears to the total capital payable to the company. It is a measure of the interest in the company's assets to which a person holding a share is entitled.

Farwell J. in *Borland's Trustee v. Steel Bros. & Co. Ltd.* observed that "...A share is not a sum of money but is an interest measured by a sum of money and

made up of various rights contained in the contract, including the right to a sum of money of a more or less amount". You should note that the shareholders are not, in the eyes of law, part-owners of the undertaking. The undertaking is something different from the totality of the shareholders. The rights and obligations attaching to a share are those prescribed by the memorandum and the articles of a company. It must, however, be remembered that a shareholder not only has contractual rights against the company, but also certain other rights which accrue to him according to the provisions of the Compaines Act.

The shares or other interests of a member of a company are movable properties transferable in the manner prescribed by the articles of the company (Section 82). Each share in a company, having a share capital, must be distinguished by its appropriate number (Section 83).

Kinds of share capital : The share of a company formed on or after 1st April, 1956, or issued on or after that date, must be of two kinds only, viz., (a) preference shares and (b) equity shares (Sections 85 & 86). Shares are not regarded as preference, unless they confer on the holder thereof the following two rights, namely, (a) a preferential right to be paid dividend of a fixed amount or an amount calculated at a fixed rate which may either be free or be subject of income-tax : and (b) a preferential right on a winding up to the repayment of capital. In other words, if these two rights are not attached to the shares, these will not be looked upon as preference shares.

[Section 86 is inapplicable to a private company, which is not subsidiary of a public company. Therefore, a private company may also issue share capital of any other kind than those stated above, if the private company so thinks fit].

Preference shares may be participating or non-participating. They are said to be participating, when they confer the right over and above the preferential right to the payment of a fixed dividend and return of capital, to participate in the surplus profits as well as in the surplus assets, upon a winding up along with equity shares. Further, the preference shares may be cumulative or non-cumulative. They are said to be cumulative when they confer the preferential right to receive dividend at a fixed rate, whenever a dividend is declared for the period, the dividend has accrued but has not been paid, before any dividend is paid on equity shares. For example, if the dividend for a year has not been paid at the end of it owing to insufficiency of profits, the same would be payable in the year following, if there are profits together with the dividend of the year. If, however, the shares are non-cumulative, then the right to receive the dividend is limited only to that for the year in which there are profits and a dividend has been declared ; these do not confer the right to recover arrears of dividends as in the first case.

Redeemable preference shares : A company limited by shares or a company limited by guarantee and having a share capital cannot purchase its own shares unless the consequent reduction of capital is effected and sanctioned in pursuance of the provisions of the Companies Act (Section 77). However, there is an exception to this rule under Section 80 [Section 77(5)]. Section 80 provides that a

company's articles may authorise it to issue preference shares which are, at the option of the company, liable to be redeemed, out of the company's profits available for devidends or out of the proceeds of a fresh issue of shares made for the purpose of redemption. Where any such shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, a sum equal to the nominal amount of the shares redeemed must be transferred from profits otherwise available for dividends to an account to be styled "Capital Redemption Reserve Account". The purpose of creating this account is to prevent, in effect, a reduction of capital, since this fund would be treated as if it were a part of the capital of the company. Also before the redemption, the premium, if any, payable on redemption should be provided out of the profits or out of the balance in the share premium account. Besides, shares can be redeemed only when they are fully paid up. You must not forget that compliance with all these conditions is mandatory, once the articles of the company have bestowed on it the authority to issue redeemable preference shares.

Subject to the provisions of Section 80, the redemption of preference shares may be effected on such terms and in such manner as may be provided by the articles of the company. The redemption shall not be taken as reducing the amount of the authorised capital of the company. When a company has redeemed or is about to redeem its preference shares, it can issue shares up to the nominal amount of shares redeemed or to be redeemed as if those shares had never been issued at all. The capital redemption reserve account mentioned above may be applied by the company in paying up unissued shares of the company to be issued to members thereof as fully paid bonus shares.

You will have noticed that Section 80, in case of the failure to comply with the provisions of this Section, renders the company and every officer of it, who is in default punishable with fine extending up to to Rs. 1,000; but the Section does not give an inkling of ideas about the remedy that will be available to the shareholders if the company fails or is unable to redeem any preference shares which it has issued as redeemable by a certain date. Where the shares are to be redeemed only at the option of the company, the shareholders cannot have any grievance. But if the company has undertaken to redeem after the lapse of the period then it seems that an order for winding up may have to be obtained against the company on the "just and equitable" ground.

You should bear in mind that the preference shareholders are only shareholders; they do not come to hold the position of creditors. Consequently, they cannot sue for the money due on the shares, which have been undertaken to be redeemed; nor can they claim, as a matter of right, a return of their share money except in a winding up

It may be noted that the aforementioned redemption of redeemable preference shares will have to be notified to the Registrar within 30 days after the date of redeeming (Section 95). Redeemable preference shares must be specified in the balance-sheet (Schedule VI).

Variation of shareholders' rights : Where as hare capital of a company is divided into different classes of shares, it may sometimes be necessary for it to amend the rights attached to one or more classes of shares. Its memorandum or articles may authorise the variation of the rights attaching to any of the shares. Also, there might be a situation where the memorandum or the articles of the company are silent on the point of variation of shareholders' rights. In either of these circumstances can the company straightaway vary the shareholders' right without undergoing any other formality? The answer is 'No'. These rights can be varied only if the consent in writing of the holders of not less than three-fourths of the issued shares of the concerned class has been taken, or only if the sanction through a special resolution passed at a separate meeting of the holders of the issued shares of that class has been taken prior to the issue of variation of the rights. However if such variation is prohibited by the terms of the aforesaid class of shares, then the variation will not be possible (Section 106).

You must note that the variation as contemplated by Section 106 is the variation which is to the prejudice of any class of shareholders. That is to say, in case the variation involves curtailment of rights of any class or classes of shareholders, the aforesaid consent or sanction of the said class or classes will be required. If the variation pertains to adding or enhancing rights of any classes, then also the compliance with the provisions of Section 106 is necessary. It has been held that a variation which affects only the enjoyment of a right without modifying the right itself does not fall within the purview of Section 106 (*In re. Hindustan General Electric Corporation, A.I.R. 1909. Cal. 672*). Once the variation is effected in strict consonance with the provisions of Section 106, it is complete, no farther steps being necessary to adopt it (*In re, Rampuria Cotton Mills Ltd. 53 C.W.N. 11*) Further, in the event of the variation of right being a part of a scheme of arrangement with the intervention of the Court under Section 391 (this is excluded from the syllabus), Section 106 will be inapplicable (*In re. General Electric Corporatian* [*Supra*]).

If the minority feels opressed or prejudiced by the variation as aforesaid, then Section 107 will have to be invoked.

In the light of the above-mentioned provisions, the procedure which is generally followed in regard to variation of rights attached to a particular class of shares is as under :

A meeting of the shareholders, holding the shares of the class, rights attached to which are sought to be altered, is convened. (The quorum for a meeting shall be at least 2 persons present in person or by proxy in the case of a private company; in the case of a public company, the number of members present should be 5.) If the meeting passes the special resolution then variation can be proceeded with [Section 170(2)(b); Section 174(1)].

Shareholders holding not less than 10%, in the aggregate, of issued shares of that class, being persons who have not consented to or voted for the resolution

for the variation of the rights, may apply to the Court to have the variation cancelled. The application has to be made within 21 days from the date of passing of the resolution. In the case where an application has been made, the variation shall be effective only after it has been confirmed by the Court. The decision of the Court on any such application shall be final. If the Court has made an order, the company must, within 30 days after the service on the company of any order by it, forward a copy of it to the registrar (Section 107). It would be worth noting in this context that sub-division of shares is not tantamount to variation.

Voting rights of a member: Section 87 governs the voting rights of members. Every holder of an equity shares has the right to vote, by virtue of his share in the capital, on every resolution placed before the company. And his voting right on a poll shall be in proportion to the amount paid up on his share. A member's right to vote on a poll may be exercised by him personally or through a proxy.

Every holder of preference shares has a right to vote only on a resolution which directly affects the rights attached to the preference share capital. A resolution for the winding up of the company or the repayment or the reduction of its shaer capital is deemed to directly affect the rights of holders of preference shares. Where preference shares are cumulative as to dividend and the devidend thereon has remained unpaid for an aggregate period of not less than 2 years preceding the date of any meeting of the company, the preference shareholders shall have the right to vote on every resolution placed before the meeting. On the other hand, if the preference shares are not cumulative as regards dividend, then the holders thereof will be able to exercise the above-mentioned extended right of voting only if dividend due on shares has remained unpaid for not less than 2 years ending with the expiry of the financial year immediately preceding the commencement of the meeting or for an aggregate period of not less than 3 years out of 6 years ending with the expiry of the financial year aforesaid. In all the adove cases, the right of preference shareholders to vote on a poll shall be in the same proportion as the capital paid up on such shares bears to the total paid up equity capital of the company. Dividend on preference shares, whether declared or not, shall be deemed to be due on the last date of the period specified for payment in the articles or other instrument executed by the company in that behalf. Alternatively, if no such date is specified, the dividend, shall be deemed to be due on the day immediately following such period. The provisions stated above are, however, subject to the provisions of section 89 and Section 92 (2) which we shall discuss hereunder,

A company can, by making a provision in the articles, restrain a shareholder from exercising his voting rights in respect of any share registered in his name on which any call or other amount due has not been paid or on which the company has a lien or exercised a lien. But a public company or a private company which is a subsidiary of the public company cannot prohibit a member from voting on the ground that he has not held his share or other interest for a specified period before the time of voting or on any other ground except as mentioned above.

An issue of share with disproportionate voting rights is prohibited. No company formed or issuing capital after April 1, 1956 can issue any equity share capital carrying voting rights, or rights, as to dividend capital or otherwise which are disproportionate to the rights as regards previously issued equity capital of the company (Section 88). That is to say, Section 88 prohibits the issue of shares with disproportionate rights not only as regards voting rights which must, without variation be in conformity with those declared by Section 87 but also as regards dividend or capital. Since the prohibition does not apply, as is apparent from Section 88, to preference shares, it boils down to this that preference shares may carry different rights as to dividend, capital or otherwise, depending upon the terms of issue of shares, although, as regards voting rights, they must conform to the provisions of Section 87 (discussed above).

It is true that excessive voting rights on share capital before 1-4-1956 are terminable, under Section 89, by the end of a period of one year after 1-4-1956.

Nothing in section 85 (relating to the two kinds of shares capital), 86 (relating to new issue of share capital consisting of two kinds), 88 (relating to prohibition of issue of shares with disproportionate voting rights) and 89 (regarding termination of disproportionately excessive voting rights in existing companies) shall, in the case of shares issued by a public company before the commencement of the Companies (Amendment) Act, 1974 affect any voting rights attached to the shares as to dividend, capital or otherwise. Further, nothing in Sections 85 to 89 shall apply to a private Company, unless it is a subsidiary of a public company. For the removal of doubts, it is declared that, on and from the commencement of the Companies (Amendment) Act, 1974, the provisions of Section 87 shall apply in relation to the voting rights attached to the preference shares issued by a public company before 1-4-1956 as they apply to the preference shares issued by a company after that date. It may be noted that reference to a public company (in this paragraph) shall be construed as including references to a private company which is a subsidiary of a public company (Section 90 as amended by the 1974 Amendment Act.

A company may, if so authorised by its articles, accept from any member the whole or any part of the uncalled amount on shares, but the member will not be entitled to voting rights in respect of the sum paid by him until it becomes payable (Section 92). It is an exception to the rule that the voting rights of equity and preference shareholder on a poll will be in same proportion as the capital paid up on those shares bears to the total paid-up equity capital.

Further issue of capital (Rights Shares i.e. Right of Pre-emption—Section 81): Sometimes it may so happen that a company may desire to expand its activities or it may stand in need of more financial resources even in the absence of expansion of activities. In such a situation, it may issue a part or the whole of its unissued share capital. Suppose at any time, after the expiry of two years from the date of the company's incorporation or after one year from the date of the first allotment of shares,

whichever is earlier a public company limited by shares wishes to issue further shares within the limits of the authorised capital. In such circumstances, the directors of the company must first offer such further shares to the existing equity shareholders in proportion, as nearly as circumstances admit to the capital paid up, on their shares at the time of the further issue. The company must give notice to each of the equity shareholder, giving him the option to buy the shares offered to him by the company. The shareholders must be informed of the number of shares he has the option to buy. At least 15 days must be allowed to each of the equity shareholders to consider whether he would exercise his option or not. If the shareholder does not accept the offer within the said 15 days, then he shall be deemed to have declined the offer. In that case or if he declines the offer, the director can proceed to dispose of those shares in such manner as they may think most beneficial to the company. Unless the company's articles otherwise provide, the directors must under Sec. 81 (1)(c) state in the notice of offer the fact that the shareholder has also the right to renounce the offer in whole or in part, in favour of some other person. That some other person or persons may or may not be member or members of the company. If the person in whose favour the renunciation is made, declines to buy the shares renounced by the equity shareholders in his favour, the director may proceed to dispose of all those shares in such manner as they may think fit ; the equity shareholders cannot for a second time exercise the right of renunciation on the ground that the persons in whose favour the renunciation was first made has declined to take the shares comprised in the renunciation [Section 81 (1)].

However, the company may, by a special resolution at a general meeting decide that the directors need not offer the shares (in the further issue) to the existing equity shareholders and that they (the directors) may dispose of all the shares (in the further share capital) in any manner whatsoever. Where a special resolution is not passed but an ordinary resolution is passed allowing the directors to dispose of the further shares in the manner most beneficial to the company, the directors may do so, without giving any option to the existing equity shareholders, *provided* the Central Government has sanctioned such issue after being satisfied that the most beneficial to the company [Section 81 (1A)]. The impact of this provision is that the manner of distribution of any further shares, decided to be issued by the Board of Directors, may be changed and the shares may be issued wholly or partly to any person otherwise than in accordance with sub-section (1) discussed above. But either a special resolution must sanction it, or an ordinary resolution together with the Central Government's approval would be necessary. Unless the issue to such person or persons is beneficial to the company, the Central Government will not accord its approval.

It has been held by the Supreme Court that neither S. 81 (1) (c) nor S. 81 (1A) would apply to a private company which has become a public company by virtue of S. 43A but has retained in its articles the three matters referred to in S. 3 (1) (iii). The provision contained in S. 81 (1) (c) of the Companies Act, 1956, cannot be con

strued in a manner which will lead to the negation of the option exercised by a private company which has become a public company by virtue of S. 43A to retain in its articles the three matters referred to in S. 3 (1) (iii). Both these are statutory provisions and they are contained in the same statute, and must be harmonised, unless the words of the statute are so plain, are unambiguous and the policy of the statute so clear that to harmonise will be doing violence to those words and to that policy. The policy points in the direction that the integrity and structure of "S. 43A proviso-companies" should, as far as possible, not be broken up. Since S. 81 (1) (c) of the Companies Act, 1956, is subject to the qualification 'unless' the articles of the company otherwise provide', while interpreting that section and allied provisions of the Act it would be necessary to have regard to the relevant articles of association of a company. In the context in which a private company becomes a public company under S. 43A and by reason of the option available to it under the proviso, the word 'provide' must be understood to mean "provide expressly or by necessary implication". The necessary implication of a provision has the same effect and relevance in law as an express provision has, unless the relevance or what is necessarily implied is excluded by the use of clear words. Considering particularly the genesis of 'S. 43A-proviso-companies", in order to attract the opening words of cl. (c) of S. 81 (1), it is not necessary that the articles of the company must contain an express provision otherwise than what it contained in cl. (c). [*Needle Industries (India) Ltd. and Others* v. *Needle Industries and Newey (India) Holding Ltd. and Others (1981) 51 Comp. Cas. (S. C.) 743 at pp 745–746*].

The provision of Section 81 do not apply : (a) to private companies ; or (b) to the increase of the subscribed capital of a public company caused by the exercise of an option attached to debentures issued or loans raised by the company. The option should be (i) to subscribe for shares of the company, or (ii) to convert such loans or debentures in the company provided that the terms of issue of such debentures or the terms of such loans include a term providing for such option and such term ; (a) either has been approved by the Central Government before the issue of the debentures or the raising of the loans, or is in conformity with the rules, if any, made by the Government in this connection ; and (b) in the case of debentures or loans other than debentures issued to, or loans obtained from, the Government or any institution specified by the Central Government in this behalf, has also been approved by a special resolution passed by the company in general meeting before such issue or raising of the loans.

Moreover, the Central Government may allow a Government holder of the debentures or a Government lender of money to the company to ask for shares of the company in lieu of the loan or debentures even though the instrument of debenture or of the loan does not contain any provision giving the holder or the lender the option to convert loans or debentures into shares of the company. In such a case, the Central Government may impose such terms and conditions as it may think fit. It is the duty of the Central Government, in imposing the terms and

conditions, to see that it pays due regard to the financial position of the company the terms of the issue of the debentures or of the loans as the case may be, the rate of interest payable thereon, the capital of the company, its loan liabilities, its reserves, its profits during the preceding 5 years and the current market price of the shares in the company. It must take all these facts into account before imposing the terms and conditions of the conversion into shares. Such an order can be made if, in the opinion of the Central Government, it is necessary to do so. A copy of every such order issued by the Central Government must be laid in draft before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more successive sessions If the terms and conditions of the conversion ordered by the Central Gonernment are not acceptable to the company, the company may, within 30 days from the date of communication to it of such order or within such further time as may be granted by the Court, appeal to the Court in respect of those terms and conditions. The decision of the Court, on such appeal shall be final and conclusive and binding both on the company and Central Government.

You should note that since the Companies Act, 1956 did not prescribe for a *written* application for allotment of shares, there can be an oral offer for the purpose and allotment on its basis. Therefore, once the allotment has been made on the basis of such an oral offer for allotment of shares under Section 81, the absence of a written application cannot be subsequently impleaded, so as to question the allotment. [*See Ayyangar Spinning and Weaving Mills Ltd. v. V. V. V. Rajendra & others* (1973) 43 *Comp. Cas.* 225]. It should further be noted that the issue and allotment of shares in payment for (a) property sold or transferred or (b) goods or machinery supplied or (c) services rendered to the company in or about the formation or promotion of or the conduct of business which would not fall within the purview of Section 81, it being applicable only when the company proposes to increase its subscribed capital by allotment of shares to the public. Where the articles empower the directors to issue and allot shares as fully or partly paid up in full or part payment for the said purposes and the allotment was made pursuant to this power, then only it would be outside the ambit of Section 81 (*Ibid*).

Steps to be taken by a company in respect of further shares : (i) To wait till the period of 2 years after its incorporation has elapsed.

(ii) To see that the rights shares (i. e., issue of further shares or right of pre-emption) is within the authorised share capital. Otherwise the steps relating to the increase of company's capital will have to be taken.

(iii) To obtain the permission of the Controller of Capital Issues by following the procedures laid down by the Capital Issues (Control) Act, Exemption Order and the Application Rules framed thereunder, if the issue to be made is beyond the exemption limit of Rs. 50 lakhs in 12 months.

(iv) To call a Board meeting so as to—(a) consider the proposal for rights issue and the proportion in which the same should be issued ; (b) fix up the date, time, place and agenda for the general meeting, if for increase of capital the permi-

sion of the general meeting is required under the articles of association ; (c) pass a special resolution of the rights shares (further shares) are to be issued to the member registered on a particular date, as under Section 81, the words "holders of equity shares" have been held to mean not only the registered equity share-holders of the company but all the holders of the company, whether or not registerd and accordingly draw up agenda,

(v) To issue notices of the general meeting with suitable explanatory statement if necessary, and to hold the meeting and pass the resolution.

(vi) To file the resolution, if it is a special resolution, together with the explanatory statement, with the Registrar in form 23 within 30 days of the passing thereof (Section 192 which is excluded from your syllabus).

(vii) To call another Board meeting and approve thereat : (a) letter of rights and matters in respect thereof ; (b) the dates of closing the Register of Members and Share Transfer Books if they are to be closed. If the decision is in favour of the closure of the books then to complete the procedure in respect thereof and (c) whether to offer additional shares in case some members do not take up rights shares.

(viii) To obtain permission of the Reserve Bank if rights shares are to be allotted to non-residents.

(ix) To issue letters of rights to all members entitled to rights shares stating therein amongst others, the number of shares offered and the time-limit being not less than 15 days from the date of the offer, within which the offer, if not accepted, will be deemed to have been declined [Section 81 (1)(b)]. If the articles do not provide otherwise, the offer shall be renounceable one and the said letter shall mention this fact [Section 81 (1) (c)]. A person cannot exercise the rights of renunciation in second time [Section 81 (2) (b)].

(x) To complete the steps regarding allotment and issue of share certificates during the period between the receipts of applications and the last date fixed for accepting the offer.

(xi) To dispose of the shares at the absolute discretion of the Board of the Directors in such a manner as it thinks most beneficial to the company, on the expiry of the period specified in the notice aforesaid, or on the receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered.

(xii) To complete other formalities, for example, issue of allotment letters, filing of allotment return, issue of share certificates, etc.

Conversion of shares into stock : "Stock" is an aggregate of fully paid shares that have been legally consolidated. The consolidated amount is divisible into fractions of any amount, regardless of the nominal value of the shares that have been consolidated. It thus represents a part of the capital of the company fully paid.

By virtue of the powers contained in Section 94(1)(c) of the Act, a company limited by shares, if authorised by its articles, may by means of a resolution passed

at a general meeting alter the conditions of its memorandum with a view to converting all or any of its fully paid shares into stock and also reconvert its stock into shares. However, the company cannot issue stock *ab initio*. It must issue shares and after they are fully paid up, convert them into stock.

The main advantage claimed for stock is that it is transferable in any denomination which is not limited to the nominal value of the share converted into a stock. This advantage may be limited by such a regulation as contained in the proviso to Regulation 37 of Table A. This regulation runs thus :"provided that the Board may from time to time fix the minimum amount of stock transferable so however, that such minimum shall not exceed the nominal amount of shares from the stock arose".

Alteration of share capital : In terms of Section 94, a limited company having a share capital may, if so authorised by its articles, alter the conditions of its memorandum in the following manner :

(a) by increasing its share capital by such amount as it thinks expedient by issuing new shares ;

(b) by consolidating and dividing all or any of its share capital into share of larger amount than its existing shares :

(c) by converting into stock or reconverting it in the manner stated above ;

(d) by sub-dividing its shares or any of them into shares of smaller amount than what is fixed by the memorandum, so however that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(b) by cancelling shares which, at the date of the passing of the resolution in that behalf, have not been taken over or agreed to be taken by any person and by diminishing the amount of its share capital by the amount of the shares so cancelled.

The powers conferred by Section 94 shall be exercised by the company in general meeting and shall not be required to be confirmed by the Court. A cancellation of the shares under Section 94 will not amount to a reduction of share capital within the meaning of the Act. If the articles do not contain the provision enabling alteration of the capital, then the company must first alter its articles by a special resolution and then obtain the necessary powers. The powers of alteration may then be exercised by passing an ordinary resolution of the company in a general meeting unless the articles require a special resolution.

Within 30 days of the shares having been consolidated, converted, sub-divided, redeemed or cancelled or the stock having been reconverted, notice should be given to the Registrar specifying the alteration made. The Registrar shall make the necessary alterations in the memorandum or articles (Section 95). Where a company having a share capital has increased its capital beyond the authorised capital or has increased the numbers of its members beyond the registered number,

notice thereof is required to be given to the Registrar within 30 days of the passing of the resolution authorising the increase (Section 97).

Share capital to stand increased where an order is made under Section 81(4): The provisions in this regard are contained in Section 94A, inserted anew by the Companies (Amendment) Act, 1974. (Section 81(4) empowers the Central Government to convert its debentures or loan amount in a company into capital. Any such conversion has naturally the effect of increasing the share capital of the company. Section 94A has been enacted to provide for the same. Sub-sections (1) and (2) of Section 94A provide that where the Central Government or any public financial institution has converted its debentures or loans into capital, the capital of the company shall stand increased by an equal amount and the company's memorandum shall stand altered accordingly. Accordingly to sub-section (3) of Section 94A, in either case mentioned in sub-sections (1) and (2) the Central Government is required to send a copy of the order to the Registrar and also to the company. On the receipt of such order from the Central Government, the company shall file in the prescribed form, within 30 days from the date of such receipt, a return to the Registrar with regard to the increase of capital. On the receipt of the Central Government's order as aforesaid and the return from the company, the Registrar shall carry out the necessary alterations in the memorandum of the company.

Reserve liability: It (also called reserve capital) is the portion of the share capital which has not been already called up. This reserve share capital is not capable of being called up except in the event and for the purpose of the company being wound up, once such decision has been taken by a limited company by a special resolution (Section 99). Moreover, a peculiarity of "reserve capital" is that it cannot be dealt with in any manner even under a power in its memorandum or articles *Bartlett Mayfair Property Company* (1898) 2 Ch. 28). Therefore, a company cannot borrow on the security of its reserve capital.

Reduction of the share capital: You have already read in earlier Study Papers that it is to the capital of the company which members have invested or undertaken to invest and to the assets represented thereby, that creditors look for the satisfaction of their claims. This has therefore been the principle of the Company Law that share capital shall be reduced only subject to special safeguards.

Section 100 of the Companies Act provides that a company, limited by shares or guarantee and having share capital, *if so authorised by the articles, may by special resolution and the confirmation of the Court*, reduce its share capital in any way and in particular by;

(a) extinguishing or reducing the liability of members in respect of the capital not paid up;

(b) writing off or cancelling any paid-up capital which has been lost or is not represented by available assets as where the value of the assets has depreciated;

(c) paying off any paid-up share capital which is in excess of the wants of the company ; or

(d) any other way approved by the company.

Reduction in (b) and (c) may be made either in addition or without extinguishing or reducing the liability of the members for uncalled capital.

Reduction of share capital may in reality take three forms, namely, (i) reducing the value of shares in order to absorb the accumulated losses suffered by the company without any payment to the shareholders : (ii) extinction of liability in respect of capital not paid up ; and (iii) paying off any paid-up share capital and/or extinction of liability in respect of capital not paid up. Only in the circumstances referred to in (ii) and (iii) is the interest of creditors really involved.

After passing the special resolution under Section 100, the company has to apply under Section 101 to the Court for an order confirming the reduction. After the petition for Court's confirmation has been filed, the Court must settle the list of creditors who are entitled to object, e.g., the creditors having a debt or a claim admissible on a winding up. For settling it, the Court must ascertain the names of those creditors and the nature and amount of their debts or claims. The Court may publish notices fixing a day or days within which the creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction [Section 101(2)(b)].

When a creditor (entered on the list) whose debts or claim is not discharged or has not been determined, does not consent to the reduction, then the Court has the power to dispense with the consent of that creditor, on the company securing the payment of the debt or claim by appropriating the full amount or the amount fixed by the Court [Section 101(2)(c)].

However, the Court has discretionary power having regard to any special circumstances of the case to direct that the provsions of Section 101(2) shall not apply as regards any classes of creditors [Section 101(3)].

As regards the "special circumstances", these must be such at would convince the Court that with reasonable foresight it can be said that the proposed reduction of capital would not adversely affect the relevant creditor and would not render them any worse off than if he had attended and objected to the application for confirmation [*Re. Lucanic Tempscule Billard Hall (London) Ltd.* (1965) 3. All E. R. 879).

In regard to every creditor of the company, who under Section 101 is entitled to object to the reduction, if the Court is satisfied that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has been determined or has been secured, then it may make an order confirming the reduction on such terms and conditions as it thinks fit (Section 102(1)].

The Court may order that the words "and reduced" [be added to the name of the company for certain period. The Court may further require the company to publish the reasons for the reduction and the causes which have led to it [Section 102(2)].

Registration of order and minutes of reduction : *According to Section 103, the Registrar must register the order and minutes (approved by the Court) of reduction. It must be done : (i) on the production of an order of the Court confirming the reduction, and (ii) on the delivery of a certified copy of the order and minutes approved by the Court.*

The certified copy of the order must show the following items, namely :

(i) The amount of share capital ;

(ii) the number of shares into which it has to be divided ;

(iii) the amount of each share ; and

(iv) the amount, if any, at the date of registration deemed to be paid up on each share.

On registration of the order and the minutes, but not before, the resolution shall become effective. The notice of the registration must be published in such a manner as the Court may direct. The Registrar then will issue a certificate which will be conclusive evidence that the requirements of the Act as to the reduction have been complied with and that the share of the company is only that as stated in the minutes. The minutes shall be deemed to be substituted for the corresponding part of the memorandum thereby altering the memorandum within the meaning of Section 40 ;

Therefore, the copies of the memorandum which will be issued subsequently must be in accordance with the alteration.

Liability of members in respect of reduced shares : Under Section 104, on a reduction of share capital, the extent of the liability of any past or present member on any call or contributions shall not exceed the difference between :

(a) the amount paid on shares or the reduced amount, if any, which is deemed to have been paid thereon by the member ; and

(b) the amount of the shares as fixed by the minutes of reduction.

It may so happen that the name of a creditor has not been entered on the list of creditors owing to his ignorance of the proceedings for reduction or owing to his ignorance of the nature and effect of such proceedings in respect of his claim. It may also happen that, after the reduction, the company is unable, within the meaning of the provisions of Sections 434 of the Act with respect to winding up by the Court, to pay the amount of his debt or claim. In all these circumstances : (a) *every person* who was a member of the company at the time of registration of the order for reduction and minutes is liable to contribute for the payment of debt or claim an amount not exceeding the amount which he would have contributed if the winding up of the company had commenced on the day immediately before the date of registration of order and minutes ; and (b) if the company is wound up, the Court, on the application by the creditor as also on the proof of his ignorance, may settle a list of contributories and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

Reduction of share capital vs. diminution of share capital : Section 100 of the Companies Act provides for the reduction of capital. For this, the articles must give the authority : it is not enough to provide for it in the memorandum. If the articles do not so authorise, then these must be altered by a special resolution first and thereafter a second special resolution will have to be passed to reduce the capital, in the manner proposed. Reduction of capital may be a reduction in the nominal capital, reduction at the same time in issued capital, a reduction in the paid-up capital or in the capital that has been issued but not paid up (e.g., where an uncalled liability is cancelled).

The term "diminution" denotes a cancellation of the *authorised* but not *issued* capital or as Section 94(1)(e) of the Act states it, the cancellation of "shares which at the date of the passing of the resolution in that behalf have not been taken or agreed to be taken by person".

Section 94(3) specifically states that diminution does not constitute a reduction within the meaning of the Companies Act. The expressions "diminution of share capital" and "reduction of share capital" differ from each other in the following respects :

(1) Reduction may involve reduction *inter alia* of issued capital, whereas diminution may be in respect of authorised capital but not of issued capital.

(2) If the articles authorise the procedure, diminution can be effected by an ordinary resolution, while reduction (which also need authorisation by articles), can be effected only by a special resolution.

(3) Diminution needs no confirmation by the Court [Section 94(2)], but reduction needs such confirmation (Section 101).

(4) Where a company is ordered to add to its name the words "and reduced" these words shall, until the expiry of the period specified in the order, be deemed to be part of the company's name [Section 102(3)] ; but such a provision does not exist in the case of diminution of share capital as envisaged in Section 94 (1)(e).

(5) In the case of diminution, notice is to be given to the Registrar within 30 days from the date of cancellation whereupon the Registrar shall record the notice and make the necessary alteration in the memorandum or articles or both [S. 95(1)(f) & (2)] : whereas in the case of reduction, a more detailed procedure regarding notice to the Registrar has been prescribed by Section 103, though there is no such time limit as aforesaid (i.e., 30 days).

Prohibition on purchase, by the company, on its own shares : According to Section 77(1), no company (whether limited by shares or limited by guarantee and having a share capital) can buy its own shares unless the consequent reduction of capital is effected and sanctioned in pursuance of the provisions of the Companies Act.

Further, under Section 77(2), no public company and its private subsidiaries can give any financial assistance in whatever way for the purpose of or in connection with a purchase or subscription made or to be made by any person or for any shares in the company or in its holding company. But this prohibition does not

extend to : (a) the lending of money by a banking company in the ordinary course of its business ; or (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding campany, being a purchase or subscription by trustees of or for shares to be held by, or for the benefit of, employees of the company, including any director holding a salaried office or employment in the company ; (c) the making by a company of loan equivalent to one's 6 months' salary or wages to a *bona fide* employee (other than a director manager) so as to enable him to parchase of subscribe for fully paid-up shares in the company or its holding company for their own benefits. Contravention of these provisions renders the company, and every officer of the company who is in default, punishable with fine extending up to Rs. 1000. It may further be noted that the right of a company to redeem any shares issued under Section 80 or under any corresponding provisions in any previous companies law remains unaffected by the above-mentioned provisions.

Issue of shares at a discount : A company cannot issue shares in disregard of Section 79. It may issue at a discount, shares of a class already issued only if all the following conditions are fulfilled.

(a) The issue must have been authorised by a resolution passed by the company in general meeting, and sanctioned by the Company Law Board (C.L.B.)

(b) The said resolution must specify the maximum rate of discount, at which the shares are to be issued. By virtue of the proviso added to Section 79 by the Amendment Act, 1974, no such resolution shall be sanctioned by the Company Law Board if the maximum rate of discount specified in the resolution exceeds 10%, unless the C.L.B. is of the opinion that a higher percentage of discount may be allowed in the special circumstances of the case.

(c) At the date of issue, not less than one year ought to have elapsed since the date on which the company was entitled to commence business.

(d) Lastly, the shares to be issued at a discount have been issued within 2 months after the date of the C.L.B.'s sanction or within the time extended by it.

On passing the resolution authorising the said issue, the company may apply to the C.L.B. for its sanction thereon. Thereupon, if the C.L.B. thinks it proper to sanction, may do so on such terms and conditions as it thinks fit.

Every prospectus relating to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or so much of that discount as has not been written off at the date of the issue of the prospectus. A default in compliance with this requirement will render the company, and every officer thereof who is at fault punishable with fine extending to Rs. 50

Director's liability in respect of improper issue of shares at a discount : In such a case, the directors render themselves liable to compensate the company to the extent of the amount of discount [*Hirsche v. Sims*, (1894) A.C. 654]. Even the acceptor of shares, in such a case has to pay back to the company the amount of discount if he holds the shares (*Re Pitkin* (James) & Co. (1916) 95 L.J. Ch. 318]. This he would have to do if the conditions of Section 79 are not satisfied, despite

the fact that he did not know the legal effect of his contrat to take share at a discount or that the memorandum or articles give the directors the power to issue shares at a discount. [*Welden v. Saffery* (1897) A.C. 229 ; *Re Pitkin Supra*]. But the allottee may avoid liability to take the shares if he applies on discovery of illegality of the discount allowed without delay, before commencement of the winding up of the company, to have his name removed as a shareholder provided he has not otherwise agreed to keep the shares [*Re Midland Electric Co.* (1889) 60 L.T.; (1892) Bom. 672].

Issue of shares at a premium : There is no provision in the Act, which can prevent a company from issuing a share at a premium, e.g. Rs. 100 share at the price of Rs. 125. But a sum equal to the aggegate amount of value of the premium of those shares must be transferred to an account described as "share premium account". The word 'amount' refers to a cash premium and the word 'value' to a premium other than cash. Shares issued for a consideration other than cash will be treated as having been issued at a premium if the value of the assets in consideration of which they are issued is more than the nominal value of the shares. Where a holding company, formed for the purpose of amalgamating two existing companies, acquires assets of a greater value than the nominal value of the shares issued by it in exchange for the existing shares of the amalgamated companies ; it is required to transfer the excess value of the assets acquired to its share premium account (*Head Henry & Co. v. Ropner Holdings Ltd.* (1951) I ALL E.R. 944]. Thus, it is clear that a company can issue shares at a premium also for a consideration other than cash.

The provisions of the Act relating to reduction of share capital (except as provided in Section 78) apply as if the share premium account was the paid-up share capital of the company. According to the provisions of Section 78(2) the share premium account can be utilised only for the under-mentioned purposes :

(a) In paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares :
(b) In writing off the preliminary expenses of the company :
(c) In writing off the expenses of or commission paid or discount allowed on any issue of shares or debentures of the company ;
(d) In providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.

There is no prohibition in the Act against issue of shares at differential premium. The value at which the acquirer of shares may pay in excess of the par value for acquiring the shares, depends upon the contract between the company and the acquirer of such shares. [*C.I.T. v. Standard Vacuum Oil Company* A.I.R. (1966) S.C. 1393].

Share certificate : A share certificate is a document of title issued by the company declaring that the person named therein is the owner of a specified number of shares in the capital of the company. As regards the status of a shareholder, it has been decided that he is not in the eye of law part-owner of the

undertaking. The undertaking is somewhat different from the totality of the shareholdings.

Implications of a share certificate: The issue of share certificate by the company creates estoppel as to title and also as to payment.

(a) *Estoppel as to title*: The company cannot deny the truth of the certificate as against a person who has relied upon it and who, in consequence, has changed his position. But if an officer of the company, who has no authority to issue certificates, issue a forged certificate, then there is no estoppel (*Ruben v. Great Fingal Consolidated* (1906) A.C. 439; *South London Greyhound Racecourses Ltd. v. Wake* 1931 I Ch. 496).

(b) *Estoppel as to payment*: Where a company states that shares are fully paid up, it cannot later contend that they were not, unless the person relying upon the certificate knew that the shares were not in fact fully paid up (*Bloomenthol v. Ford* (1897) A.C. 156. It has also been held in another case that the *bona fide* holder of the share certificate, who had no notice that the shares were not actually paid up fully, could sell those shares away as fully paid to a person who knew that they were not fully paid so as to give the latter a good title to shares as fully paid because the latter derived title from the transferor who had a good title [*Gulabdas's* (1892) 17 Bom. 672].

A certificate, however, does not confirm the existence of an equitable interest in the share and as such, the company owes no obligation to a person who holds such an interest. The title of mortgage, with whom a share certificate and blank transfer have been deposited, may be defeated by the borrower selling all the shares and procuring the registration of the purchaser by obtaining a duplicate certificate. The purchaser, in such cases, would obtain priority over the mortgagee, since the mortgagee would have no remedy against the company [*Reinford v. James Keith Blackman and Co.* (1905) 1. Ch. 296].

Section 84 provides that a certificate under the common seal of the company which specifies any shares by any member shall be *prima facie* evidence of the title of the member to such shares. The certificate is not conclusive proof of the title of the member, specified in the certificate, to certain shares mentioned therein. To the shareholders this evidence is useful in so far as that it enables him to prove his title to any shares that he might be desiring to transfer, pledge, or charge. A share certificate, however, cannot be described as a "share". It is just *prima facie* evidence of the title to a share or shares presented by the certificate [*Gopal Paper Mills Ltd. v. C.I.T. Central Calcutta* (1966) 1 Com. L.J. 174].

Section 84(2) provides that a company may renew or issue a duplicate certificate if it is proved to have been lost or destroyed or having been defaced, mutilated or torn, after the certificate is surrendered to the company. Section 84(4) makes it obligatory for companies to follow the rules prescribed by the Government in regard to the following matters:

(i) The manner of issue or renewal of a certificate or issue of a duplicate thereof.

(ii) The form of a certificate (original or renewed or a duplicate thereof).

(iii) The particulars to be entered in the Register of Members or in the register of renewed or duplicate certificate.

(iv) The form of such registers.

(v) The fee on payment of which the terms and conditions, if any, including terms and conditions as to evidence and indemnity and reimbursement for expenses incurred in connection with investigating evidence on which a certificate may be renewed or duplicate thereof may be issued [The Companies (Issue of Shares Certificates) Rules, 1960].

The Company Law Board, having discovered that a certain group of companies had been fraudulently issuing duplicate, triplicate, sometimes quadruplicate share certificate without the original certificate having been surrendered to the company, framed the foregoing rules. There are rules which have been issued by virtue of the provisions of Section 642(1)(b). The principal provisions thereunder are briefly summarised below :

Rule 3. "Board' means the Board of Directors of the company or a committee thereof consisting of at least two directors if their number does not exceed 6 and on the number exceeding 6, of at least 3 directors ; also that at least half of the members of the Committee of the Board concerned with the issue of shares shall consist of persons who are not the managing or whole-time directors or representatives of directors or to whom provisions of Section 261 are applicable.

Rule 4 (1). Before a share certificate can be issued, the Board must pass a resolution to that effect and either the letter of allotment or fractional coupons of requisite values shall be surrendered to the company. Where such documentary evidence is not available due to the same having been lost or destroyed, the Board shall prescribe such reasonable conditions as regards indemnity and payment of incidental expenses which the company may have to incur in investigating the evidence for the purpose of proving the title of the shares.

Rule 4(2). A certificate cannot be issued in exchange of sub-divided or consolidated share or in replacement of defaced, torn, old, decrepit, worn-out ones or where the cages on reverse for recording transfers have been duly made use of, unless the certificate in lieu of which it is issued, has been surrendered to the company.

Rule 4(3). The duplicate share certificate must not be issued in lieu of the lost or destroyed share certificate, without prior consent of the Board having been obtained or without payment having been made of fees not exceeding Rs. 2/- and on such reasonable terms as regards evidence, etc., as the Board thinks fit.

Rule 5. (1) Every certificate must contain the name or names of persons who are owners of the shares to which the certificate relates and amount paid up thereon.

Rule 5(2). Where a certificate has been issued in replacement of an old certificate, such a fact must be entered on the face of the certificate and against the stub or counterfoil.

Rule 5 (3). When certficate is issued in lieu of one lost or destroyed, it

must contain the statement "Duplicate issued in lieu of certificate No....." in addition, the word 'duplicate' shall be stamped or punched in bold letters across the face of the share certificate.

Rule 6. The share certificate must be issued under the common seal of the company which must be affixed in the presence of two directors or their attorneys and the Secretary or any other persons appointed for the purpose by the Board. Also, all these persons must sign the share certificate. One of the two directors must be a person other than the managing or wholetime director.

Rule 7. Particulars in respect of the certificate issued under Rule 4(1) must be entered on the Register of Members against the names of persons and in whose favour the certificates have been issued, indicating the date of the issue. Similarly, entries must also be made in respect of certificates issued under Rule 4(2) and (3) in a register of renewed and duplicate certificates indicating against the names of members, the number and date of issue of certificate, in lieu whereof the new certificate has been issued. Both these categories of entries should be authenticated either by the Secretary or by a person appointed by the Board.

Rule 8. All forms intended for the issue of share certificates must be printed under the authority of a resolution of the Board and a person appointed by the Board shall be in the custody of all blocks and other equipment of their printing.

Rule 9. The Managing Director, if any, but otherwise every director of the company must be responsible for the safe custody of all books and documents pertaining to the issue of share certificate.

Duties of the companies as to the share certificates: Secion 113 requires that every company must, unless the conditions of shares provide otherwise, complete and have ready for delivery the certificates of all shares allotted or transferred. This must be done *within 3 months* of the allotment of shares and *within two months* after the application for registration of a transfer (that is, transfer duly stamped and otherwise valid but not including such a transfer as the company is for any reason entitled to refuse to register and it is not so registered) of any such shares.

Penalty for impersonation of shareholders: If any person deceitfully impersonates an owner of any share or interest in the company, or of any share warrant or coupon and thereby obtains or attempts to obtain any such share or interest or any such warrant of coupon, or receives or attempts to receive any money due to any such owner, then he shall be liable to imprisonment up to three years and shall be liable to fine (Section 116).

Share warrant: You must first know what a share warrant is. It is a document which a public company issues in conformity with the statutory requirements; it is issued under the common seal of the company and states that the holders of the warrant is entitled to certain number of shares specified therein. It is a bearer document and the title to the shares specified therein can be transferred by mere delivery of the share warrant. To that extent, it is a negotiable instrument. Under Section 114 of the Act, the issue of such share warrant can be made only if

the company is so authorised by its articles and permission of the Central Government has been obtained. (Table A contains regulations permitting issue of share warrants). Further, share warrants to bearer can be issued only in respect of fully paid shares. Dividend coupons are attached to the share warrants providing for the payment of future dividends on the shares specified in the warrants.

The particulars under Section 115 which must be entered in the Register of Members upon the issue of a share warrant are as follows, namely :

(i) the fact of the issue of warrant ;
(ii) a statement of the shares included in the warrant, distinguishing each share by its number ; and
(iii) the date of the issue of warrant.

A private company cannot assume power in its articles to issue share warrants. Since share warrants are transferable by delivery, such a condition would be opposed to the restriction on transferability which is an essential requirement in the case of a private company.

The articles of a public company may provide that the bearer of a share warrant shall be deemed to be a member of the company for the purposes defined by the articles. However, holding of a share warrant does not operate as a qualification for being a director of a company, where such is required under the articles.

On the issue of a share warrant to a member, his name must be struck off the Register of Members. But the bearer of warrant shall, subject to the articles of the company, be entitled on surrendering the warrant for cancellation and paying such fee to the company as may be prescribed from time to time by the Board of Directors, to have his name entered as a member in the Register of Members. The company shall be responsible for any loss incurred by any person by reason of the company entering in its Register of Members the name of a bearer of a share warrant in respect of the shares therein specified without a warrant being surrendered or cancelled.

Calls on shares. Regulations 13-18 of Table A of Schedule 1 to the Act deal with calls on shares.

A 'call' be defined as a demand made by a company on its shareholders to pay the whole or a part of the balance, remaining unpaid on each share at any time during the continuance of a company. A call can also be made by a liquidator in the course of the winding up of the company (*Ramchandran v. Manickam* (1941) A.I R. Mad. 565). If a part of the uncalled capital of the company is treated as a reserve capital, a call cannot be made in respect of such capital during the continuance of the company ; it can be made only on liquidation (Section 99). From the time a call is made, the amount called up becomes a debt due to the company within the meaning of Section 36(2) ; as such the company is entitled to charge interest on it during the period of default.

Furthermore, if any sums which are due on allotment or if calls are not paid,

then the directors may, if so empowered by the articles, forfeit the shares. But they may do so only after giving a notice to the shareholders to this effect.

The Board of Directors alone is empowered to make a call. The power cannot be delegated to a director or to a committee of directors or to any other officer of the company (Section 292). A call on the shares falling under the same class must be made on a uniform basis. Shares of the same nominal value, on which different amounts have been paid up, are not deemed to fall under the 'same class' (Section 91). The Board's resolution making the call must specify the amount of call per share and the time allowed for its payment. The calls are made and are payable according to the conditions prescribed by the articles of the company. A call must not exceed 1/4th of the nominal value of shares or be payable at less than one month from the date fixed for the payment of the last preceding call.

But before we conclude our discussion on calls we have also to know how payment in advance of calls is treated by a company. A company may, if so authorised by the articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up [Section 92 (1)]. The amount so received or accepted is described as payment in advance of calls. When a company receives payment in advance of calls, the consequences will be as follows :

(i) The shareholder is not entitled to voting rights in respect of the moneys so paid by him until the same would, but for such payment, become presently payable [Section 92 (2)].

(ii) The shareholder's liability to the company in respect of the call for which the amount is paid is extinguished.

(iii) The shareholder is entitled to claim interest on the amount of the call to the extent payable according to articles of association. If there are no profits, it must be paid out of capital, because shareholder becomes the creditor of the company in respect of this amount.

(iv) The amount received in advance of calls is not refundable.

(v) In the event of winding up the shareholder ranks after the creditors, but must be paid his amount with interest, if any, before the other shareholders are paid off.

(vi) The power to receive the payment in advance of calls must be exercised in the general interest and for the benefit of the company (Syke's case (1872) L.R. 13 Eq. 255).

Transfer of shares : This expression means the voluntary conveyance of the rights and possibly, the duties of a member (as represented in a share in the company) from a shareholder who wishes to cease to be a member to a person desirous of becoming a member. Subject to the provisions of the articles of the company and to any statutory restrictions, a shareholder has an unrestricted right to transfer his shares (Section 82). The transfer must be made by proper instrument of transfer duly stamped and executed by and on behalf of the transfer or and by or on behalf of the transferee specifying the name, address and the occupation of the transferee. The instrument must be delivered to the company along

certificate relating to the shares, or if no such certificate is in existence, along with a letter of allotment of the shares [Section 108(1)]. For effecting a valid transfer of the shares, the procedure prescribed by Section 108 must be followed.

To check the tendency to hold share under a blank transfer, Section 108 of the Act provides for certain remedial measures for transfer of shares. But before we go into that, we must know what this 'blank transfer' after all is. You know that the ownership of shares in a company is generally transferred from one person to another by the execution of a document by the seller and the buyer. This document is variously described as a 'transfer instrument' or 'transfer deed' or simply 'transfer'. But in a blank transfer, the seller only fills in this name and signs it. Neither the buyer's name and signature nor the date of sale is filled in the transfer form. This will enable the buyer to sell the shares again to a subsequent buyer without filling his name and signature. The process of purchase and sale can be repeated any number of times with the blank deed and, he can fill in his name and date and get it registered in the company's book. For such ultimate transfer and registrations, the first seller will be treated as the transferor.

The widespread practice of blank transfers which was prevalent before the Companies Act, 1956, lent itself to certain abuses, the most important of which were : (1) avoidance of transfer stamps ; (2) concealment of the identity of the real beneficial owners behind their nominees ; (3) evasion of tax by suppression of 'secret' profit invested in holdings on blank transfers.

Based on the recommendations of a commission of inquiry, the law amended in 1965 and 1966 imposing certain restrictions on the system of blank transfers designed mainly to limit the period of currency of blank transfers. These are :

(A) Every instrument of transfer, before it is signed by the transferor, must be presented in such form as may be prescribed, to the prescribed authority for endorsement thereon of the date of presentation. It may be noted that the Company Law Board has invested this authority in the Registrar of companies.

(B Thereafter, the said instrument shall, if it is executed by or on behalf of the transferor and the transferee, be delivered for the registration to the company : (i) in the case of shares dealt in or quoted on a recognised stock exchange at any time before the date on which the Register of Members subsequent to the date of transfer is closed for the first time or within two months from the date of such presentation whichever is later ; (ii) in any other case, within two months from the date of such presentation [Section 108(IA)].

The above mentioned provisions are not applicable to transfer of shares held: (a) by a company in any other body corporate in the name of director or nominee pursuant to Section 49(2) or (3) ; or (b) by a corporation owned or controlled by the Central Government or a State Government in any other body corporate ; or (c) in respect of which a declaration has been made to the Public Trustee under Section 153B.

These exemptions are operative only [illegible] the following two conditions are complied with, namely : (i) if the company or corporation referred to in (a) & (b) above stamps or otherwise endorses on the form of transfer the date on which it decides [illegible] in the name of the said director [illegible]

Public Trustee mentioned in (c) above stamps or otherwise endorses on the form under his seal, the date on which the form is presented to him ; (ii) if the instrument of transfer, complete in itself, is delivered to the body corporate in whose share capital, such company or corporation has made the investment in the name of its director or nominne, or to the company in which such share is held in trust ; this completed instrument of transfer is to be delivered as aforesaid within two months of the date, so stamped or otherwise endorsed.

Another exemption has been made in respect of shares deposited by way of security for the repayment of any loan advanced to, or for the performance of any obligation undertaken by such a person when these are deposited with (i) the State Bank of India ; or (ii) any scheduled bank ; (iii) any banking company other than a scheduled bank of financial institution as may have been approved by the Central Government ; or (iv) the Central Government or a State Government or any Corporation owned or controlled by the Central or the State Government. This exemption can be availed of, if the following conditions are complied with, namely, (i) that the bank, institution, Government or Corporation stamps or otherwise endorses in the form of transfers : (a) the date on which such shares are returned to the depositor ; or (b) the date of release of such shares for sale, when the depositor has defaulted in the discharge of his obligation ; or (c) the date on which the instrument of transfer relating to such share is executed where the bank, institution, etc., intends to get such shares registered in its own name ; (ii) that the instrument is delivered to the company within two months from the date so stamped or endorsed.

Another exemption has also been made in respect of any share which is held in any company by the Central Government or a State Government in the name of its nominee, except that every instrument of transfer which is executed on or after 1-10-1966 in respect of any such share should be in the prescribed form.

All the abovementioned exemptions are contained in Section 108 (IC). To mitigate any hardship, the Government may, on an application made to it in that behalf, extend the period mentioned in Section 108(IA), (IB), and (IC) by such further time as it may deem fit whether such application for extension of the period is made before or after the expiry of the periods aforesaid. The number of extensions so granted together with the period of each such extension must be shown in the Annual Report laid before the Houses of Parliament under Section 638 [Section 108(ID)].

Thus you will have noticed that generally transaction by way of blank transfers cannot run beyond two months. In order to avoid practical difficulties, exemption has been provided in a number of specified cases discussed above.

It may be noted that under Section 27 of the Securities Contracts (Regulation) Act, 1956, it is lawful for the holder of any security whose name appears in the books of the company, issuing the said security, to receive and retain any dividend declared by the company, in respect thereof for any year, notwithstanding that the said security has already been transferred by him for consideration, unless the transferee has given the dividend to the transferor.

company for being registered in his own name within 15 days of the date on which the dividend became due.

When a shareholder intends to transfer only a part of his holding to a single transferee or different parts of his holding to 2 more transferees, then he will not be able to part with his share certificate. In such circumstances, he must lodge the certificate with the company along with the instrument of transfer at its registered office and request the secretary, manager or other officer concerned, to make a note of the shares transferred by him to the transferee This process is known as "lodging the certificate", and "certification" is the act of noting by the secretary, etc., and stating that the share certificate has been lodged with the company. When only a portion of the share is transferred, the company usually issues a ticket to the transferor for the balances of the shares which have not been transferred. Such a ticket is called a 'balance ticket'.

Certificate does not operate as a warrant by the company as to the title of the transferor; it is merely a representation that documents showing a *Prima facie* title of the shares mentioned in the instrument of transfer have been produced to the company; and the company is liable to any person who acts on the faith of an erroneous certification whether made negligently or fraudulently (Section 112).

Restriction on the acquisition of shares: This topic is contained in Section 108A which has been introduced for the first time by the Companies (Amendment) Act, 1974. It requires the previous approval of the Central Government for acquiring equity shares of a public company beyond a certain limit. Section 108A(1) provides that if an individual, group, constituent of a group, firm, body corporate under the same management, jointly or severally, directly or indirectly, proposes to acquire the equity shares of a public company or private company to the extent of, along with those (if any) already held, 25% of the paid-up equity share capital of the company, then such an acquisition shall require the approval of the Central Government. Under Section 108A (2), an acquisition in contravention of the said provision, i.e., without the previous approval of the Central Government, shall render the acquirer punishable with imprisonment for a term extending up to 3 years, or with fine extending up to Rs. 5,000 or with both.

Restriction on the transfer: Under Section 108B (1) if a body corporate or bodies corporate under the same management, holding 10% or more of the nominal value of the subscribed equity capital of another company, propose transfer of any such shares, it shall intimate the Central Government about the proposal. Such intimation shall include a statement as to the particulars of the shares proposed to be transferred, the name and address of the transferee and the shares, if any, already held by him (i.e., the transferee) in that company and such other particulars as may be prescribed.

On the receipt of the aforesaid intimation, the Central Government may by order, direct that no such share will be transferred to the proposed transferee. But, before the issue of this order, it must be satisfied: (a) that such transfer is likely to result in a change in the composition of the Board of Directors of the [illegible] be considered in the interest of the

preclude the body corporate or bodies corporate from intimating in accordance with the aforesaid provisions, to the Central Government its proposal to transfer the shares to any other person. What does this provision imply ? Let us explain its implication by means of an illustration. Suppose X Co. Ltd. intimates the Central Government about its proposal to transfer its shares to Y Co Ltd., but the Central Government restrains the transfer under Section 108B (2)(a). Now, by virtue of the said proviso, X Co. Ltd, in spite of the rejection of its proposal, can intimate the Central Government about its next proposal to transfer its shares to A Co. Ltd., instead of Y Co. Ltd. If the shares are those of a company engaged in any industry specified in Schedule XIII to the Act, then the Central Government shall order the shares to be transferred to its own self or to any corporation owned or controlled by the Central Government [Section 108B(2) (b)]. On such an order being made, the shares stand transferred to the Central Government or as the case may be to the corporation owned or controlled by the Central Government. But the Central Government or the corporation, as the case may be shall pay the *market value* of the shares so transferred. If the share is quoted on a stock exchange, then the 'market value' means the value quoted thereat on the date of the Central Government's order; if the share, is not quoted at any stock exchange, then the market value means the value mutually agreed upon between the holders of the share and the Central Government, or corporation and, in the absence of this mutual agreement, value determined by the Court [Section 108B (3) together with the Explanation thereto]. Where there is no dispute as regards value, the payment shall be made forthwith. But, in case of any dispute, as to the market value, such value as estimated by the Central Government or corporation, should be paid forthwith and balance within 30 days from the date when the market value is determined by the Court [Section 108B (4)]. Where, after receiving the intimation, the Central Government makes no order within 60 days, its power shall cease [Section 108B (5)]. For contravention of the provisions of Section 108B, every body corporate which makes any transfer of shares in contravention shall be punishable with fine extending up to Rs. 5,000 and in case of contravention made by a company, every officer of the company who is in default, shall be punishable with imprisonment for a term extending to 3 years [Section 108B (6)].

Restriction on the transfer of shares of foreign companies : A body corporate or bodies corporate under the same management, which holds in the aggregate 10% or more of the nominal value of the equity share capital of a foreign company having a place of business in India cannot transfer such shares to any Indian citizen or Indian company except with the previous approval of the Central Government. And the Central Government shall not refuse this approval unless it is satisfied that the transfer would be prejudicial to the public interest [Section 108C (1)]. For contravention of this provision as well, the penal provisions are the same mentioned in Section 108B (6) [Section 108C (2)].

Central Government's power to direct companies not be given effect to the transfer : Where the Central Government is satisfied that consequ

the company is likely to take place and that such change would be prejudicial to the interest of the company or to the public interest, it may restrain the company from giving effect to the transfer. Where the transfer has already been registered, the Central Government may direct not to permit the transferee his nominee or proxy to exercise any vote or other rights attached to the shares. Similarly, where the aforesaid transfer has not been registerd, the Central Government may direct not to permit any nominee or proxy of the tranferor to exercise any voting power or other rights attached to the shares [Section 108D (1)]. If a direction of this kind has been issued by the Central Government, then the shares shall stand revested in the transferor and he shall refund the price to the transferee paid by the latter to the former [Section 108D (2)]. If the price is not refunded to the transferee within 30 days from the date of the direction, then the Central Government shall on the application of the transferee, order the refund; such order may be enforced as if it were a decree made by a Civil Court [Section 108 D (3)]. After making such refund, the transferor becomes eligible to exercise his voting or other rights attached to such shares or block of shares [Section 108D (4)].

Time within which refusal to be communicated: The Central Government is required to grant its approval under Section 108A (relating to the proposal for the acquisition of any shares) and Section 108C (relating to transfer of shares of foreign companies) within 60 days from the date of the receipt of such request. If the application is not rejected within this time, then the Central Government is deemed to have granted approval Section 108E].

Penalty for contravention of Section 108A, 108B or 108C: Every person who exercises any voting or other right in relation to any share acquired in contravention of the provisions of Section 108A, Section 108B, or Section 108C shall be punishable with imprisonment for a term extending upto 5 years and shall also be liable to fine [Section 108F (1)]. If any company gives effect to any voting or other right exercised in contravention of any of those Sections as aforesaid, then the company and every officer of the company, who is in default, shall be punishable with fine which may extend to Rs. 5,000 or with imprisonment for a term extending up to 3 years, or with both [Section 108F(2)].

According to Section 108G, the restrictions contemplated by Section 108A, 108B, 108C or 108D do not apply to transfer of shares of the following companies, namely, (a) any company in which not less than 51% of the share capital is held by the Central Government; (b) any corporation (not being a company) established by or under any Central Act; and (c) public financial institution specified by or under Section 4A.

References in Sections 108A, 108B, 108C and 108D to shares or share capital (as the case may be) shall be construed as references to shares or share capital respectively, of a body corporate owning any undertaking to which the provisions of Part A of Chapter III of the Monopolies and Restrictive Trade Practices Act, 1969, apply, and any reference in Sections 108A, 108B and 108C to "same management" shall be construed as a reference to "same management" as defined in clause (g) of Section 2 of the MRTP Act 1969 (Section 108H as amended by the Companies (Amendment) Act, 1977 with effect from 24-12-77).

Registration by a Company of transfer of partly paid shares : By Section 110, an application for the registration has to be made either by the transferor or by the transferee. This is in addition to execution of the transfer form. Where it is made by the transferor and the shares sought to be transferred are *partly paid*, the company must serve notice of the application upon the transferee. If the transferee does not raise any objection to the proposed transfer within two weeks from the date of the receipt of the notice, the company may register the transfer if it so decides, and enter the name of the transferee in its Register or Members as if the application was made by the transferee himself. The notice is to be given by a registered letter addressed to the tranferee at the address given on the transfer form. The letter will be deemed to have been duly delivered after 48 hours from sending of the letter. The provision is intended to warn the transferee about his liability for future calls on the shares.

Under Section 108(1), a company shall not register a transfer, unless along with the application for registration of transfer, the proper instrument of transfer, duly executed both by the transferor and the transferee, has been delivered to the company together with the certificate or, if no certificate exists, the letter of allotment. Under Section 108(1A), the transfer instrument has to be in the prescribed form. Before this form is signed by or on behalf of the transferor and before any entry is made therein, it has to be presented to the prescribed authority, being a person already in the service of the Government, who shall stamp or otherwise endorse thereon the date, on which it is so presented. Thereafter, the said instrument shall be executed by the transferor and the transferee and completed in all other respects. Then it shall be delivered to the company. Where the shares are quoted on or dealt in on a recognised stock exchange, such form shall be delivered to the company within 2 months from the date put on the form by the prescribed authority or before the Register of Members is closed, whichever is later ; in any other case, the delivery has to be made within 2 months from the date put on the form by the prescribed authority.

Power to refuse registration and appeal against refusal : Section 111 (1) provides that nothing in Sections 108, 109 and 110 shall prejudice any power of the company under its articles to refuse to register the transfer or transmission by operation of law of the right to any shares or interest of a member in, or debentures of the company. In this context, we shall consider a leading case.

Two issues came up for decision in *Rangpur Tea Association Ltd v. Makhan Lal Samaddar* (1973) 43 *Comp. Cas* 58. First when can directors refuse to register the transfer of shares ? It was held that since a member of the company has an unfettered right to transfer his shares to another person, the directors could refuse his application for registration of the same *only if* the articles of association of the company empowered the Board of Directors to so refuse. That is to say, a transferee under a valid transfer enjoys the absolute right to be registered, unless the company has assumed specific power under its articles to refuse to register. It is true that the Companies (Amendment) Act, 1965, has introduced the words 'or otherwise', but it has not thereby created any additional or new power for the company. Secondly when can the discretion to refuse registration

be exerciseable by the directors; whether it is exerciseable when the transferee made attempts previously to wind up the company? Held: where the articles confer an absolute direction on the directors to refuse registration, it is to be exercised only on *bona fide* grounds. That is to say, it can be exercised if it is in the interest of the company as well as the shareholders as a whole. Simply because the transferee made previous attempt to wind up the company, it would not be said that the directors acted lawfully in refusing to register shares in the name of the transferee.

If the company refuses to register any such transfer or transmission of right, then it must serve notice of the such refusal both on the transferor and the transferee within two months of the date on which the instrument of transfer or intimation of such transmission was delivered to the company. The aggrieved part has the right of appeal to the Central Government (where the company is a public company or a private company which is a subsidiary or a public company) against the refusal of the company to register the transfer of transmission, or against failure on its part, within the period mentioned in Section 111 (2) either to register the transfer or transmission or to send notice of its refusal to register the same [Section 111 (3)]. The above-mentioned appeal to the Central Government against the refusal to register a transfer or transmission must be made within two months from the date of the receipt of the notice of the refusal. But this appeal against the failure by the company within the period mentioned in Section 111 (2) either to register the transfer or transmission or to send notice of its refusal to register the same must be made within two months from the expiry of the period referred to in Section 111 (2) [Section 111 (4)]. The said appeal to the Central Government must be made by a petition accompained by such fee not exceeding Rs. 50 as may be prescribed by the Central Government [Section 111 (4A)]. The Central Government, after giving notice to the parties concerned and reasonable opportunity to make their representations, may by order in writing, direct either that the transmission or transfer shall be registered by the company or that it may not be registered by it. If the Central Government directs in favour of the registration of transfer or transmission, then the company must give effect to this direction within 10 days from the date of the receipt of the order [Section 111 (5)]. Before passing the aforementioned order, the Central Government may require the company to disclose the reason for its refusal to register the transfer or transmission. If the company fails or refuses to disclose the reasons then the Central Government may presume that the disclosure, if made, would be unfavourable to the company [Section 111 (5A)].

In the case of a private company which is not a subsidairy of the public company, where the right to any shares or interest of the member in, or debentures of, the company is ttansmitted by a sale thereof held by a Court or other public authority, provisions of Section 111 (3) to (7) shall apply as though the company is a public company [Section 111 (8)]. It is further provided that the Central Government may instead of an order under Section 111 (5) discussed above, pass an order directing the company to register the transmission of the right unless any member or members of the company (specified in the order) requires the right

aforesaid on payment to the purchaser of the price paid by him therefor or such other sum as the Central Government may determine to be reasonable compensation for the right in all circumstances of the case [*Proviso to Section 111 (8)*].

Forged Transfers : A forged transfer is a nullity. It does not give the transferee concerned any title to the shares. If the company acts on a forged transfer and removes the name of the real owner from the Register of Members then the company is bound to restore the name of the real owner on the register as the holder of the shares and to pay him any dividends which he ought to have received (*Barton v. North Staffordshire Railway Co. 38 Ch. D. 456. People Insurance Co. Ltd v. Wood & Co. Ltd. (1961)* 31 *Comp. Cas 63.*)

Thus, if by forgery, A obtains a certificate of transfer of shares from a company and transfers the shares to a purchaser for value acting in good faith, i.e., without the knowledge of the forgery, such purchaser does not get a good title to the shares so transferred, because a forged transfer is a nullity and cannot be a source of a valid transfer of title. But the company shall be liable to compensate the purchaser in so far as the company had issued a certificate of transfer and was therefore estopped from denying the liability accruing from its own act. The innocent purchaser for value acting upon the faith of the certificate issued by the company could validly and reasonably assume that the person named in the certificate as the owner of shares was really the owner of the shares represented by the certificate. [*Balkis Consolidated Co. v. Tomkinson* (1892) A.C. 1961]. If as a result of the forged transfer, the name of the true owner of shares is taken off the Register of Members, he can compel the company to restore his name to the register. He can also claim any dividend which may not have been paid to him during the intervening period [*Barton v. North Staffordshire Supra*]. Likewise transferee must take care that he is not getting a certificate from the company on a forged transfer, because in that case the transferee shall be liable to indemnify the company against the consequences of the damages which may have to be paid by the company to the true owner of the shares (*Sheffield Corporation v. Barclay* 1905) B.C. 392). The person who even without any negligence brings about a transfer is liable to indemnify the company against its liability to the onwer of shares whose name was taken off from the register as a result of the forged transfer. [*Sheffield Corporation v. Barclay Supra; Starkey v. Bank of England* (1903) A. C 104].

Transmission of shares : It takes place when shares are transferred under the operation of law, either on the death of the registered shareholder or on his being adjudged as insolvent. It also takes place where the holder is a company if it goes into liquidation. Upon the death, the shares of the deceased vest in his executors or administrators and the estate becomes liable for calls if the shares are not fully paid up. In the like manner, the official assignee or the receiver, as the case may be, is also entitled to be registered as a member in the place of the shareholder who has been adjudged an insolvent [*R. W. Key and Sons* (1902) 1 Ch. 467]. However, the executors or administrators may decline to be registered as members for various reasons. In that event the legal representatives, by virtue of Section 109, shall be entitled to transfer the shares of the deceased irrespective

of whether they are partly paid or fully paid. Similarly the official assignee has the statutory power to transfer the shares under Section 58 (1) of the Presidency-Towns Insolvency Act.

The distinction between transfer and transmission, thus is that the former is the effect of deliberate act of the member whereas the latter is the result of operation of law on the death or insolvency of a member. Again unlike a transfer, in the case of the transmission of shares, an execution of any instrument of transfer is not required. Transmission is recorded by the company on the basis of evidence showing the entitlement of the transferee to the shares. No stamp duty is payable on transmission of shares, it being a part of the estate of the deceased which has already borne duty; nor does the company charge any fee for registering a transmission.

Forfeiture and surrender of shares : Forfeiture is the remedy for the non-payment of calls or instalments of call of or other sums as premiums due in respect of shares. Such a power can be exercised only if the articles expressly so provide and the procedure laid down thereunder is strictly adhered to. The effect of the forfeiture of a member's shares is that he ceases to be a member. If the shares are partly paid, then he is discharged from the liability *qua* shareholders to pay the balance of the amount due on the shares. (But the articles may reserve the liability in respect of sums already called up but not yet paid by him, in which case this creates new liability and he will be liable for these sums as an ordinary debtor and not as a shareholder.) Limitation begins to run from the date of forfeiture.

You have already noticed that a company can forfeit shares for non-payment of calls only if it has taken powers (most companies do so take) in the articles for the purpose. Further, in *Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.* (1971) 41 *Comp. Cas.* 51 (S. C.), it has been held that forfeiture of shares for non-compliance with any other engagement than to pay calls is also valid, provided the articles stipulate so. Nonetheless directors should exercise this power carefully, for in the case of any irregularity, the dispossessed shareholder may have the forfeiture annulled. The power of forfeiture is required to be exercised *bona fide*, in the interest of the company; it must not be collusive or fraudulent.

The procedure to be followed in this regard is laid down in Regulations 29 30, 31 and 34 of Table A of Schedule I to the Companies Act, 1956. These are outlined below :

(i) If a member fails to pay anp call (or instalment of a call) on the day ap pointed for payment thereof. the board may, at any time thereafter, during such time as any part of the call for instalment remains unpaid, serve a notice on him requir ing payment of so much of the call (or instalment) as is unpaid together with any interest which may have accrued (Regulation 29). It may be noted that a proper notice is a condition precedent to forfeiture and even the slightest defect in the notice will invalidate the procedure. [*Public Passenger Service Ltd. v. M. A. Khader*

(1965) 1 *Comp. L. J.* (S.C.)]. The notice must disclose sufficient information as to the amount due.

(ii) The aforesaid notice must: (a) mention a further day (not being earlier than expiry of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made; and (b) state that if the payment is not made on or before the date so mentioned, the shares in respect of which the call was made would be liable to be forfeited.

Usually, along with the above-montioned notice an extract is sent from the articles of association, showing the directors' power to forfeit shares. If the requirements of the notice are complied with, any share in respect of which notice has been given, may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Board to the effect.

A duly verified declaration in writing that the declarant is a director, the manager or the secretary of the company and that a share in the company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the shares.

As regards surrender of shares both the Act and Table A are silent. The articles of companies, however, often empower the directors to accept the surrender of shares. Courts too recognise it on the principle that it relieves the directors of the necessity to go through the formality relating to forfeiture. Although surrender and forfeitures have almost the same effect, yet they differ from each other. Surrender is effected with the assent of the shareholder, whereas forfeiture is a proceeding in *invitum* (i.e., against a reluctant shareholder) [*Trevor v. White-work* (1887) 12 *App. Cas.* 417)]. But a surrender of shares which are not fully paid can only be accepted where forfeiture would be justified. [*Bellerly and Rowland and Marwoods Steamship Co.* (1902) 2 *Ch.* 14).

Where the company pays any consideration for the surrender of partly paid up shares, the surrender will be invalid, inasmuch as it will amount to purchase by the company of its own shares. Unless there are special circumstances, e.g., where the surrender is a part of compromise, every surrender of shares, whether or not fully paid up, involves reduction of capital, which is unlawful without the sanction of the Court. But if it does not result in the reduction of capital e.g., if the surrender is in exchange of other shares of the same nominal value, it has been held in a leading case that it can be accepted without leave of the Court but doubts have been cast on this decision by leading text-book writers like, Palmar.

Thus, it may rightly be said that surrender of shares in a company is a short-cut to forfeiture.

Capitalisation of Profit: It can only be done if the articles of the company contain provisions in regard thereto (Regulations 96 and 97 of Table A of Schedule 1). It means that profits which otherwise are available for distribution among the members, are not divided among them in cash, but the shareholders are allotted futher shares (bonus shares). Capital profits, share premium and capital redemption reserve account can also be used for the purpose of issuing fully paid bonus shares.

According to the proviso to Section 205(3), it is permissible for company to capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

The procedure as regards the issue of bonus shares has been laid down in Regulations 96 and 97 of Table A. This is as follows:

A resolution is to be passed by the Board recording its decision to issue bonus shares. On the recommendations of the Board, the company is to resolve in the general meeting that: (a) it is desirable to capitalise a part of the amount for the time being standing to the credit of any of the company's reserve accounts, or to the credit of the profit and loss account, or otherwise available for distribution and (b) such sum be accordingly set free for distribution in the specified manner amongst the members who would have been entitled thereto if distributed by way of dividend and in the same proportions.

The sum mentioned in the preceding paragraph must not be paid in cash. It must be applied (subject to the provision stated in paragraph immediately following) either in or towards, *inter alia*, (a) paying up any amounts for the time being unpaid on any shares held by such members respectively, (b) paying up in full unissued shares of the company to be allotted and distributed, credited as fully paid up, among such member in the proportions aforesaid.

A share premium account and a capital redemption reserve account may only be applied in paying up unissued shares to be issued to the members of the company as fully paid bonus shares.

The Board must give effect to the resolution passed by the company (as stated above) and make all appropriations and applications of the undivided profits resolved to be capitalised thereby, and all allotments and issue of fully paid shares, if any, and generally do all acts and things required to give effect thereto.

Under the Capital Issues Control Act, 1947, all companies are required to obtain the approval of the Controller of Capital Issues for issue of bonus shares. The detailed guidelines for the examination of such application are indicated below for the guidance of such companies while seeking approval under the Capital Issues Control Act, 1947 :—

THE GUIDELINES FOR ISSUE OF BONUS SHARES

Under the Capital Issues (Control) Act, 1947 all companies require the prior approval of the Central Government through the Controller of Capital Issues for issue of bonus shares. Government have reviewed the existing guidelines in this regard and have decided to revise them in certain respects. The revised guidelines are given below :—

1. There should be a provision in the Articles of Association of the company for capitalisation of reserves etc. If not, the company should produce a Resolution passed at the Gentral Body making provisions in the Articles of Association for capitalisation.
2. Consequent to the issue of Bonus Shares if the subscribed and paid up capital exceeds the authorised capital, a Resolution passed at the General

Body Meeting in respect of increase in the authorised capital is necessary.

3. The company should furnish a Resolution passed at General Body Meeting for bonus issue before an application is made to the Controller of Capital Issues. In the General Body Resolution the Management's intention regarding the rate of dividend to be declared in the year immediately after the bonus issue should be indicated.
4. The bonus issue is permitted to be made out of free reserve built out of the genuine profits or share premium collected in cash only.
5. Reserves created by revaluation of fixed assets are not permitted to be capitalised.
6. Development Rebate Reserve/Investment Allowance Reserve is considered as free reserve for the purpose of calculation of residual reserves test.
7. The residual reserves after the proposed capitalisation should be at least 40 per cent of the increased paid up capital.
8. All contingent liabilities disclosed in the Audited Account which have a bearing on the Net Profits, shall be taken into account in the calculation of the minimum residual reserves.
9. 30 per cent of the average profits before tax of the company for the previous three years should yield a rate of dividend on the expanded capital base of the company at 10 per cent.
10. Declaration of bonus issue in lieu of dividend is not allowed.
11. The company may make a further application for issue of bonus shares only after 36 months from the date of sanction by the Government of an earlier bonus issue, if any.
12. Bonus issues are not permitted unless the partly paid shares if any existing, are made fully paid up.
13. No bonus issue will be permitted if there is sufficient reason to believe that the company has defaulted in respect of the payment of statutory dues of the employees such as contribution of provident fund, gratuity, bonus, etc.
14. Capital Reserves appearing in the Balance Sheets of the companies as a result of revaluation of assets or without accrual of cash resources will neither be allowed to be capitalised nor taken into account in the computation of the residual reserves of 40 per cent for the purpose of bonus issue.
15. At any one time the total amount permitted to be capitalised for issue of Bonus Shares out of free reserves shall not exceed the total amount of paid up equity capital of the company.
16. Applications for issue of bonus shares should be made within one month of the bonus announcement by the Board of Directors of the company.
17. In case where there is any default in the payment of any term loans outstanding to any public financial institutions, a no objection letter from that institution in respect of the issue of bonus shares should be furnished by the companies concerned with the bonus issue application.

All applications for bonus issue should be signed by a person not below the rank of Director/Secretary together with a certificate as follows :—

I, Shri _____ in my capacity as _____ solemnly affirm that the facts stated above are true to the best of my knowledge and nothing has been withheld.

Signature.....
Name in Capital letters.....
Principal Officer of the Company.

A certificate from the Auditors of the company in the proforma as under shall also be furnished :—

"We have verified the information furnished by the company for issue of bonus shares and find the same as correct. We also certify that we have received all the information required by us for the verification.

We hereby certify that the proposal contained in the application for the issue of bonus shares meets all the requirements of the bonus guidelines, including the guidelines contained in paragraphs 8,9,11 and 13 in force issued by the Government in this regard according to the information furnished to us and to the best of our knowledge".

Signature.....
Address.....

Place :
Date :

Further, in respect of the non-residential shareholders, it would be necessary for the company to obtain the permission of the Reserve Bank under the Foreign Exchange Regulation Act, 1973.

The aforementioned resolution of the shareholders having been passed, the secretariat of the company is to prepare a list of the members entitled to bonus shares and place before the Board of Directors for allotment (which is like the ordinary allotment except that it is not based upon application for shares). After the Board's sanction to the allotment, the secretariat of the company sends letters of allotment to the allottees and also a circular explaining how the allotment has been made. When the share certificates are signed, sealed and ready for delivery, a notice is to be sent to shareholders asking them to exchange the allotment letters for the new share certificates.

Under Section 75(1)(c) when a company having a share capital makes any allotment of bonus shares, it must within 30 days thereafter file with the Registrar a return stating the number and nominal amount of such shares comprised in the allotment and the names, addresses and occupations of the allottees and a copy of the resolution authorising the issue of such shares.

Debenture: Under Section 2(12) debenture includes debenture stock bonds and other securities of the company whether constituting a charge on the assets of the company or not. Debentures are bonds issued in acknowledgement of any indebtedness. Generally, however, they are issued under the company's seal and contain a provision for the repayment of principal sum at the appointed date and the payment of interest [illegible] rate. Debentures are usually secured upon

Thus, a debenture is an instrument which is drawn under the seal of the company; it binds the company to pay a sum of money at a fixed time with interest but the debenture stock is a debt which carries interest at a fixed rate; it is constituted generally by a deed of covenant with trustees, and the stockholder obtains certificate of title. A stock is called perpetual if the principal amount of debt is payable not at any fixed time but only in the case of winding up or in case of default in paying interest.

Let us once again recapitulate the distinction between a debenture and debenture stock. The former is the description of an instrument while the latter is the description of debt or sum secured by an instrument. Lord Lindley has described debenture stock as the "borrowed capital consolidated into one mass for the sake of convenience".

'*Pari Passu*' clause in a debenture means that all the debentures of the series are to be paid ratably. If, therefore, security is insufficient to satisfy the whole debts secured by the series of debentures, the amounts of debentures will abate proportionately. If the clause is not made use of then the debentures rank in accordance with the date of issue and if they are all issued on the same date they will be payable according to their numerical order. A company, however, cannot issue a new series of debentures so as to rank *pari passu* with prior series unless the power to do so is expressly reserved and contained in the debenture deed of the previous series.

In the event of the *pari passu* clause being included in the debentures, it is enough if the following particulars are filed with Registrar within 30 days after the execution of the deed containing the charges or where there is no deed after the execution of any debentures of the series : (i) the total amount secured by the whole series ; (ii) the dates of the resolutions authorising the issue of the series : (iii) the date of deed, if any, by which security is created ; and (iv) a general description of the property charged and the names of the trustees for debenture-holders, if any, together with the deed containing the charge or a certified copy of the deed or if there is no deed, one of the debentures of the series (Section 128).

Where more than one issue is made of debentures in the series, particulars of the date and the amount of each issue must be filed with the Registrar. An omission to do so will not affect the validity of the debentures issued.

Duties of company with regard to issue of debentures : The company has the same duty as it has in the case of share certificates already discussed.

Transfer of debentures : Bearer debentures are negotiable instruments and hence are transferable by delivery, free from any equities. A *bona fide* transferee for value gets a good title notwithstanding any defect in the title of the transferor. Transfer of registered debentures takes place exactly in the same way as the transfer of shares.

Fixed and floating charges : Debentures may be secured by a fixed charge or by a floating charge or by a combination of both. A floating charge is an equitable charge which is not a specific charge on any property of the company. Thus, the company may, despite the charge, deal with any of the assets in the ordinary course of business. "It is of the essence of a floating charge that it remains dor-

ment until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created, intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default."

On the other hand, a specific (fixed) charge is a charge which is expressed to cover specific property like land, building, etc. Although the company usually remains in possession of the property, it can only deal with it subject to the prior rights created by the charge.

It is thus evident that a floating charge is characteristically ambulatory and shifting; it flows "with the property which is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp". But specific charge is a charge which fastens on to the property which is ascertained and definite or capable of being ascertained and made definite.

The main characteristics of a floating charge as described in *Re. Yorkshire Woolcomber's Association* (1930) 2 *Ch.* 284 at 285 are as follows:

(a) It is a charge on a class of the company's assets, present and future, that class being one which, in the ordinary course of the business, is changing from time to time.

(b) Generally, it is contemplated that the company carry on its business in an ordinary way with such a class of assets till some events occur on which the charge is to settle down on the property as then existing and the charge becomes fixed. The moment the charge crystallises, it becomes a fixed charge. It takes place when some event contemplated in the agreement creating the charge occurs, e.g., debenture-holders enforcing their securities on a default being made by company either in payment of interest or capital on the company being wound up.

There are two major statutory limitations to the rights arising out of floating charge. Firstly, a floating charge created within 12 months preceding the commencement of the winding up (whether compulsory or voluntary or subject to supervision), shall unless it is proved that company immediately after the creation of the charge was solvent, be invalid except up to the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for the charge together with interest on that amount at 5% per annum or at any other prescribed rate (Section 534).

(N.B. You should note that although these provisions of Section 534 are excluded from your syllabus nonetheless you should read them by way of passing reference.) Secondly, floating charge crystallizes, i.e., becomes fixed and consequently the security ceases to be a floating security (i) in the circumstances specified in the trust deed or in the debenture, upon which the charge is to become a fixed charge, i.e., failure of the company to pay interest or to redeem the debentures as agreed; cessation of business by the company; (ii) if a receiver is appointed for the debenture holders either by the Court or by the debentureholders or their trustees under power given by terms of issue of debentures; and (iii) if the company is wound up even if it is a voluntary winding up for the purpose of reconstruction (*Re, Crompton and Co.* (1914) 1 *Ch.* 954).

Under Section 123 of the Act, where a receiver is appointed on behalf of the debentureholders secured by floating charge even though the company may not be in the course of winding up, the debts which in a winding up are to be paid in priority to all other debts under Section 530 shall be paid out of the assets available in the hands of the receiver, in priority to any claim in respect of the principal or interest to which the debentureholders with floating charge are entitled. In other words, prefetential debts have priority over a debentureholder's floating charge not only in a winding up but also when a receiver is appointed in a debentureholder's action. Where the bebentures are secured both by a floating charge and a fixed charge, such priority is applicable to the assets subject to the floating charge; the fixed charge remains unaffected [*Anthony Ulysses John v. Suraj Bhan (1938) All. 869*]. The preferential payments referred to in Section 123 are to be made forthwith out of the assets that come to the hands of the receiver. If the receiver fails to do so, he thereby renders him liable in tort. But if his failure to make the preferential payment is the result of misguidance or inducement given by the debentureholders, he can claim indemnity from debentureholders. *West Ministet City Council v. Treby* (1936) 2 A.N.R. (21)].

Special provisions as to debentures: (1) The issue of debentures with voting rights is prescribed by Section 117 of the Act. It provides that no company shall, after the commencement of the Act, issue debentures carrying voting rights at any meeting of the company, whether generally or in the respect of particular classes of business. If voting rights were to be attached to the debentures, the holders thereof will be placed in a much more advantageous position as compared to holders equity capital. It would be so because the debentureholders already enjoy adequate security as regards repayment of the amount advanced by them. The right of vote, in addition, gives them the right to exercise control over the management which might be detrimental to the general body of shareholders. But the provisions of this Section are applicable only to debentures issued after the commencement of the Act. Voting rights attached to debentures that were in existence before the commencement of the Act, are not affected.

(2) Any debentureholder or any member of the company is entitled to have, on request, a copy of the trust-deed for securing any issue of debentures within 7 days from the date of the request, on payment of one repee if the trust-deed is printed and 37 paise if it is not printed. The said trust-deed is also open for inspection by any member or depentureholder (Section 118). A company has power to reissue redeemed debentures in certain cases (Section 121).

(3) Debentures convertible into shares have been taken out of the purview of Section 81 [Section 81 (3) (b)].

Remedies of a debentureholder: If the debenture is *not secured* by any mortgage or charge, then its holder has alternative remedies either (i) to sue the company for the recovery of the money secured by the debenture and execute a decree against the company's property; or (ii) to present a petition for the winding up of the company under Section 433 (e) on the ground of company's inability to pay its debts, but if the winding up is already in progress, to prove in such winding up the amount due to him like any other unsecured creditor.

Where however the debenture is *secured* by a mortgage or a charge, the holder thereof who wishes to realise his security and recover the money due to him, may resort to all or any of the following remedies :

(i) He may sue on his behalf and on behalf of other debentureholders of the same class to obtain payment or enforce his security by sale ;

(ii) He may appoint a receiver if the conditions of the issue so permit ;

(iii) He may apply to the Court for closure of the company's right to redeem the debentures. But, in such an action, all debentureholders of the company, in contradistinction to those of a class, as well as the company should be joined as parties ;

(iv) He may, in the capacity of a creditor, present an application for winding up for the principal and interest thereon ;

(v) He may have the property sold by the trustee if the debenture trustdeed permits the sale ;

(vi) In case of company's insolvency. he may value or realise his security and prove for the balance of his debt, if the security is insufficient, or give up the security and prove for the whole debt. But he is prohibited from proving for interest which became due after winding up ; also he cannot get such interest out of his security, when arriving at a balance for which he can prove in the winding up.

Registration of charge : The expression "charge" includes a mortgage (Section 184). Certain charges created on or after 1st April, 1914, on the security of the company's property or undertaking unless registered with the Registrar within 30 days of their creation, are void against the liquidator or creditor or the company. The Registrar is, however, empowered to extend this period by 7 days for sufficient cause being shown for the extension.

The following is a list of such charges : (a) a charge to secure any issue of debenture ; (b) a charge on uncalled share capital of the company ; (c) a charge on immovable property, wherever situated or any interest therein ; (d) a charge on book debts of the company ; (e) a charge, not being a pledge, on any movable property of the company ; (f) a floating charge on the undertaking or any property of the company including stock-in-trade ; (g) a charge on calls made but not paid ; (h) a charge on a ship or any share in a ship ; (i) a charge on goodwill, on a patient or a licence under a patent, on a trade-mark or on a copyright or a licence under a copyright.

Where a company raised a loan from a bank by pledging its fixed deposit receipts without registering the pledge with Registrar of Companies, it was held that since fixed deposit receipts were movable property and since the charge was in the nature of a pledge of movables, it was exempted from registration (*Meenakshi Mills v. Registrar of Companies A.I.R. (1966) Mad 24*). If moneys are advanced on "open credit" system and the goods of the company are pledge

with the bank in consideration of loan by the bank to the company and if the bank consents to the borrower withdrawing any goods, so pledged with the bank, the transaction would amount to a pledge of the goods and not a mere hypothecation. Even if the constructive possession of the pledgee bank is maintained, a subsequent pledge of the same goods even without notice of pledge to the company gets no preference over the bank. The rule of estoppel does not affect the priority of the pledge bank (*Nadar Bank Ltd. v. Canara Bank Ltd.* 1961, 21 *Camp. Cas.* 12).

Effects of non-registration: If any of the above-mentioned mortgages or charges is not registered; then the unregistered mortgage or charge shall be void against the liquidator and creditors of the company (*Monolithic Building Co,* 1915, 1 *Ch.* 643, 662). The mortgage or charge, if of the type above-mentioned, and every modification thereof has to be filed with the Registrar for registration within 30 days after the date at which, it was created; the prescribed particulars of the mortgage or charge together with the instrument. if any, creating the mortgage or evidencing it or a verified copy [Rule 6 of the Companies (Central Government's) General Rules and Forms] of such instrument, must be filed with the Registrar within 30 days after the creation of the charge or mortgage. It is however open to the Registrar to allow the particulars and instrument or copy to be filed within 7 days next following the expiry of the period of 30 days if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within the period of 30 days. Where there is a document, the time runs not from the date of agreement to advance money or the date at which the money is actually advanced, but the date at which document is executed (*Columbia Fire Proofing Co. Ltd.* 1910, 2 *Ch.* 120, *Capital and Counties Bank* 1913 2 *Ch.* 336). According to the view of the Company Law Board, if the instrument or copy of it is not filed with the Registrar within 30 days or the extended period of 7 days [as per the proviso to Section 125(1),], then the Registrar should not take the document or record even on payment of additional fees provided in Section 611(2) unless the sanction of the Company Law Board is obtained under Section 141.

Section 141(1) provides for the remedies available to the company for the failure on its part to register with the Registrar within prescribed time-limit, the particulars of the charge created by it on its immovable [property, together with documents creating it. The company may apply to the Company law Board and seek extension of time for filing of the particulars for registration. But before passing any order, the Company Law Board must be satisfied (a) that the aforesaide omission was accidental or due to inadvertence or due to some other sufficient cause or was not of the nature to prejudice the position of creditors or shareholders of the company; or (b) that it is just and equitable to grant relief on other grounds. Being thus satisfied, the Company Law Board may, and on such terms and conditions as it may deem just and convenient, direct that the time for the filing of the particulars of the charge for registration shall be extended, or as the case may require, that the omission shall be rectified.

Note : The Companies (Amendment) Act, 1974 and made certain modifications in Section 141. Accordingly, for the "Court" whenever it occurs in Section 141, the words "Company Law Board" have been substituted. Secondly, nothing in sub-section (1) of Section 141 shall affect any order made by the Court under Section 141 or any proceeding relating to any matter specified in that Section which is pending before the Court at the commencement of the Companies (Amendment) Act, 1974.

If the particulars of mortgage or charge are filed with the Registrar of Companies within the time-limit allowed under the Companies Act, it is immaterial as to when the same are actually registered by the Registrar. The mortgage or charge cannot be invalidated merely because of the delay by the Registrar in registering the particulars which were filed with him in time [*Banaras Bank Limited v. Bank of Bihar* 1 I.L.R. 1646 All 867). Though for want of registration required by Section 125 the mortgage or charge shall become void against the liquidator and creditor, the moneys payable by the company shall become immediately payable and contract or obligation to pay the debt shall remain unaffected. The effect of non registration is that the charge becomes void against liquidator and creditor, but the debt is good as a simple debt ; though the security for the debt may not be vaild, the debt itself remains good as a simple debt (*C. Padmji Company v. Moos* 27 *Bomb, L.R* 1288. Such a charge, however, remains good as charge as against the company as well. Further, in the event of the charge being void for non-registration, no right of lien can be claimed on the documents of title, as they are only ancillary to the charge and were delivered pursuant to the charge [*In Re. Molton Ltd.* (1868) *Ch.* 325 (1968), 33 *Comp. Cas.* 833].

Though floating charge on stock-in-trade requires registration, if it is not registered, the creditor who lawfully takes possession of the goods before the winding up of the company is not affected by the absence of the registration [*Mercantile Bank of India v. Chartered Bank of India 1937 All* E.R. 251]. Though want of registration makes a charge which is required to be registered under Section 125 void against liquidator and creditors, yet the charge remains good as a charge as against the company. The company whose properties or goods are charged cannot seek to repudiate the charge (or consider it good as a simple debt only), because the only consequence of non-registration under Section 125 is that the charge fails as such and is void against the liquidator and creditor. Section 125 does not provide that the charge shall be void against the company also *Monolithic Building Co's Case*, 1975, *I Ch. 643* ; *Aungdanapa v. Chettiar 5 Rang* 535 ; *Thiagrajan v. Official Liquidator* 1915, 2 *Mad. L.J.* 295 ; *Meyappaya Chettiar v. Jyanti Films (Madura) Private Ltd. A.I.R.* 1964 *Mad.* 134].

An equitable mortgage by deposit of title deeds requires to be registered [*Maneklal v. Saraspur Mfg. Co.* 29 *Bom.* C.R. 253].

A simple debenture does not require any registration under Section 125 because such debenture is neither a mortgage nor a charge, fixed or floating, but it is a simple (unsecured) debt. A mere lien does not require, registration (*Ashby Warner Co. v. Simmons* 1936 *All E.R.* 697). So also a negative lien does not require registration which applies to a charge which is created by an act of the parties (*an act in the law*) and not to a charge which comes in by operation of the law (*an act of the law*). A charge by operation of the law also does not require registration (*Hukmichand v. Pioneer Mills, A.I.R.* 1927 *Oudh* 55).

In the case of mortgage or charge created outside India, the property charged being outside India, the particulars of the mortgage or charge and the instrument creating or evidencing the mortgage or a copy of such instrument shall be filed with the Registrar for registration. The filing must be completed within 30 days after the date at which the instrument or copy would, in due course of post, and if despatched with due diligence be received in India. If the mortgage or charge is created in India but the property is outside India then the instrument creating the charge or mortgage or a copy thereof in prescribed manner must be filed with the Registrar within 30 days after the creation of the mortgage or charge even though further formalities or steps are required to complete the mortgage of the property which is outside India according to law of the land in which the property is situated.

Registration of charges and satisfaction : Registration of charges under Section 125 constitues a notice to whosoever acquires a future interest on the charged assets. The Registrar has to maintain in respect of each company a register of charges with a proper chronological index (Section 130 and 131). The certificate of registration which must be given by Registrar under his hand is conclusive evidence of proper registration (Section 132). And a copy of his certificate must be endorsed by the company on every debenture or debenture stock certificate (Section 133).

In case the appointment of a Receiver or manager is made, the person who obtains the order for such an appointment is bound to notify the Registrar about it within 30 days of the passage of the order of such appointment, and the Registrar, on payment of the prescribed fee, must enter in his register this appointment.

Part-payment or satisfaction of charge need not be intimated to the Registrar ; only satisfaction in full has to be reported within 30 days from the date of such payment or satisfaction (Section 138). The Registrar is empowered to make entries of satisfaction, even though not intimated by the company (Section 139). If the entry turns out to be incorrect, it cannot affect the chargeholder's rights unless he was a consenting party to the making of the entry. According to Section 140, the company will have to be furnished with a copy of memorandum of satisfaction.

A rectification of the register of charges can also be made under the orders of a Court on the application of the company or any person interested [Section 141 (1)].

Omission to register particulars of charges in the manner prescribed by the Act is punishable with fine which may extend up to Rs. 500 every day during which the default continues (Section 142).

Register of charges (Section 143): Every company is under an obligation to keep at its registered office a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company. In each such case, the following particulars must be entered namely—(i) a short description of the property charged, (ii) the amount of the charges and (iii) except in the case of securities to bearer, the names of the persons entitled to charges. Any officer of the company who knowingly omits or wilfully authorises or permits the omission of any such entry renders himself punishable with fine extending up to Rs. 500.

Rights of inspection of instrument and company's register of charges. During office hours, inspection by any creditor or member of the company is allowed without charging any fee therefor. An inspection of the register of charges is permitted to an outsider on payment of a fee of one rupee for each inspection at the registered office of the company. Default in allowing inspection is liable to a penalty of fine which may extend up to Rs. 10 and with further fine exending up to Rs. 20 for every day during which the default continues. The Court may also compel an immediate inspection of the copies of the register, as the case may be (Section 144).

SELF-EXAMINATION QUESTIONS

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper. The answers to these questions are not required to be written out or to be submitted for evaluation. Answers are given at the end.

1. What is the significance of 'preference shares' to their holders?
2. X Co. Ltd. wants to issue redeemable preference shares. The articles of the company are silent on this point. Can it do so?
3. The option to redeem the redeemable preference shares lies with holders thereof. Do you agree with this statement?
4. Can partly paid preference shares be redeemed?
5. Shares cannot be redeemed (i) out of company's profits which would otherwise be available for dividends (ii) out of the proceeds of fresh issue of shares. Which is correct?
6. (a) What is the technical name for the reserve to be created on redemption of preference shares? (b) what is the amount involved?

7. Is reduction of capital lawful ?
8. Conservation of capital is one of the fundamental principles of the Company Law. Why is to so ?
9. Is the authority of the articles necessary for reduction of share capital ?
10. What category of resolution is necessary for authorising the contemplated reduction of share capital ?
11. How should the company proceed next to the passage of the requisite resolution for reduction ?
12. Can the creditors object to reduction even if they are not hit by reduction ?
13. When are the creditors likely to be hit by the company's contemplated reduction ?
14. When does resolution for the reduction of share capital take effect ?
15. What is the member's liability in respect of reduced shares ?
16. Section 79 specifies circumstances in which shares can be lawfully issued at a discount. Is it necessary that all these specified circumstances must coexist for the vilidity of such an issue ?
17. In case of improper issue of shares at discount, are the directors bound to compensate the company ?
18. Can shares be issued at different premiums ?
19. Can shares at a premium be issued for consideration other than cash ?
20. What is the significance of a share certificate in so far as the company is concerned ?
21. Section 94 allows a company to increase its capital by issuing new shares. Can such new shares be offered to the public ?
22. The soundness of A & Co. Ltd. prompted B to buy the majority of the shares of the company from the open market. Immediately after the purchase of the shares by B, the directors of the company offered rights shares in conformity with the law and duly allotted them to the existing members. Two shareholders who had sold shares to B filed a suit against the scheme on two grounds : (i) that company not being in need of further capital, its allotment was not *bona fide* in the interest of the company ; and (ii) that about 275 shares of the new issue were not in fact offered to the shareholders. It was established that the company in fact needed the funds. In the circumstances, could the second contention of the shareholders be upheld ? (*Nanalal Zaver v. The Bombay Life Assurance Co. A.I.R.* 1950 *S.C*, 172).
23. (a) Can new shares be offered to outsiders in total disregard of the existing shareholders ? (b) How ?

24. Has the Central Government any power to convert into shares any debentures issued to or loan taken from the Government by a company.
25. Is variation of shareholder's right permissible where memorandum or articles contain no provision in respect to such variation?
26. The holders of 3/5ths of the issued shares of a particular class have consented to the variation in writing. Will the variation be permissible?
27. If a special resolution sanctioning the variation has been passed at a separate meeting of the shareholders of a particular class, can the rights attaching to the class be varied?
28. Suppose, the holders of at leat 10% of the shares of concerned class do not consent to or vote in favour of the resolution. Then what should they do?
29. Is there any time-limit for the action as conceived by Q 28?
30. A public company has the right to convert (i) its fully paid-up shares;
31. For the purpose of share warrants, which of the two things are necessary (ii) its partly paid-up share warrants. Which is true?
—authority of the articles or the approval of Central Government?
32. How may the bearer of a share warrant transfer the shares comprised therein?
33. Is registration of transfer with the company necessary?
34. Can a private company assume power in its articles to issue share warrants?
35. Will it be sufficient legal compliance if the instrument of transfer of share is executed only by the transferor?
36. Is it necessary to specify the name, address and occupation of the transferee in the transfer-deed?
37. Does instrument of transfer need stamping?
38. The law requires the instrument of transfer to be delivered to the company along with the certificate relating to the shares transferred. But if no such certificate is in existence then what should the parties do?
39. Can the instrument of transfer be in any form?
40. Can the instrument be signed by the transferor or can any entry be made in the instrument before it is presented to the prescribed authority?
41. What is the prescribed authority required to do with the instrument?
42. What is the next step to be taken in this regard and by whom?
43. When is the instrument to be presented to the company (a) when shares are quoted on a recognised stock exchange (b) where it is not so quoted?
44. When all the requirements relating to transfer are complied with what should the company do?
45. Can registration of transfer of shares be refused by the company on any ground?

46. The notice of refusal must be communicated to both the transferor and the transferee. But within what period ?
47. What is the remedy of the parties in case of refusal ?
48. Can the Central Government compel the company to register the transfer ?
49. Can a company borrow on the security of its reserve capital ?

Answer :

1. First entitlement to the receipt of dividends in preference to equity shareholders when the company is a going concern and to the payment of the amount paid up on preference shares when it is in liquidation ; 2. No ; 3. No ; 4. No ; 5. Both incorrect ; 6 (a) Capital Redemption Reserve Account ; (b) Amount paid on redemption ; 7. No. except when sanctioned by the Court ; 8. Capital being the only security on which the creditors rely, must not be allowed to be depleted except under genuine necessity ; 9. Yes ; 10. Special resolution ; 11. Apply to the Court by petition for its confirmation order ; 12. No ; 13. When reduction diminishes shareholders' liability to pay uncalled capital or involves payment of any unpaid share capital to any shareholder ; 14. On registration of the order and minutes of reduction ; 15. To pay the difference between the amount deemed to have been paid on his shares and the nominal value of the reduced shares ; 16. Yes ; 17. Yes to the extent of the amount of discount ; 18. Yes ; 19. Yes, against transfer of property ; 20. Creates estoppel as to the title and payment ; 21. No, to the existing equity shareholders ; 22. No. ; 23. (a) Yes ; (b) Either by a special resolution or by an ordinary resolution coupled with Central Government approval ; 24. Yes, if necessary in public interest ; 25. Yes, if such variation is not prohibited by terms of issue of share ; 26. No ; 27. Yes ; 28. Apply to the Court ; 29. Yes ; days from the date of consent or resolution ; 30. (i) ; 31. Both ; 32. By simple delivery ; 33. No ; 34. No ; 35. No ; 36, Yes ; 37. Yes ; 38. Letter of allotment to be sent ; 39. No ; 40. No ; 41. To stamp or otherwise endorse on the instrument the date of presentation, 42. Execution, completion and presentment to the company for registration by the transferor and the transferee ; 43. (a) Either before the closure of register of members or within 2 months whichever is later ; (b) Within 2 months from the date of presentation to the prescribed authority ; 44. Register the transfer and replace transferor's name by that of transferee in the Register of Members ; 45. Yes ; 46. Within 2 months ; 47. To appeal to the Central Government ; 48. Yes, if the refusal if found to be unsutifiable ; 49. No.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL F.S.P.(N.) CL—1

FINAL COURSE (N)
COMPANY LAW
STUDY—I

Contents :

—MEETINGS AND PROCEEDINGS
—ANNUAL GENERAL MEETING
—EXTRAORDINARY GENERAL MEETINGS
—FREQUENCY OF BOARD MEETINGS
—INVESTIGATION, ETC.

Prescribed Readings :

"*Lectures on Company Law*" by S.M. Shah. 17th Edition
"*Principles of Company Law*" (1977 *Edition*) *by* M.C. Shukla and S.S. Gulshan.
"*Indian Company Law*" by Avtar Singh, Latest Edition.

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MEETINGS AND PROCEEDINGS

1. **Meetings and Proceedings** (Sections 165 to 197, 217 to 220, 224, 225, 230, 231, 256, 257, 261, 263 and 264); You will have observed from earlier Study Papers on the subject that all the powers as regards management of the affairs of the company vest in its shareholders who express their views and assert their will by majority vote. The shareholders exercise powers at a general meeting.

The company, being only a conceptual entity having a distinct legal existence separate from the shareholders, can act only through agents known as directors whose powers are defined in the articles of association which can be varied from time to time by the shareholders at a general meeting but not otherwise. The assent of a member of a company given individually or by a group of them is not equivalent to resolution passed at a general meeting. Members individually cannot take any action on behalf of the company. Majority-rule prevails and decisions are taken on the basis of votes of the majority of members cast at a duly constituted meeting [*Foss* v. *Harbottle*, *1843*, *2 Hare 461*]. Likewise, the directors can exercise their powers only collectively and not individually. They must act at a Board meeting, except that certain matters can be decided by circulation of connected papers among the directors. It is thus evident that General Meetings and Board Meetings are the means of action of the company; decisions are taken at the meetings, but these are implemented by a person or body of persons appointed to manage the affairs of the company.

These are different classes of meetings that a company registered under Act may hold. These are : 1. Statutory Meeting, 2. Annual General Meeting, 3. Extraordinary General Meeting, 4. Separate meetings of different classes of shareholders, 5. Meeting called by the Court or the Central Government, 6. Meeting of Debentureholders, 7. Meeting of Creditors otherwise than in winding up.

1. **Statutory Meetings and Statutory Report** : Every public company limited by shares, or limited by a guarantee and having a share capital must hold a general meeting of the members of the company which shall be called the statutory meeting. It is to be convened after not less than one month but within six months from the date at which the company is entitled to commence business.

N.B. *Students may note that the statutory meeting is to be held only once in the life-time of the company and that private companies are not required to hold such a meeting.*

The statutory meeting is intended to afford an opportunity to the members to consider the progress that the company may have made, as disclosed by the statutory report which is circulated in advance among the members and *filed* with the Registrar. The members are at liberty to discuss at the meeting any matter relating to the formation of the company or arising out of the statutory report. Directors are required to send this report to the members of the company at least 21 days

before the meeting. Even if the report is forwarded later than required, it shall be deemed to have been duly forwarded, if all the members entitled to attend and vote agree to it. The eight particulars to be set out in the statutory report are contained in sub-section (3) of Section 165. These are : (a) the number of shares allotted, distinguishing fully or partly paid up, otherwise than for cash and stating the extent to which the partly paid up shares have been paid and the consideration for which they have been allotted ; (b) the total amount of cash received on account of shares allotted ; (c) an abstract of receipts and payments up to the date within 7 days of the date of report, exhibiting under distinctive headings of the receipts the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company, showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures ; (d) the names addresses and occupations of the directors and the auditors, manager and secretary, if any, and any changes therein, if occurred, since the date of the company's incorporation ; (e) the particulars of any contract or modifications thereof to be submitted to the meeting for its approval ; (f) the extent of the non-carrying of each underwriting contract together with the reason therefor ; (g) the arrears due on calls from every director and manager ; and (h) particulars of commission or brokerage paid or to be paid to any director or manager in connection with the issue or sale of shares or debentures.

The report aforesaid must be certified as correct by at least two directors, one of whom should be the managing director, if there be any. The auditors should also certify it to be correct insofar as the report relates to shares allotted by the company, cash received in respect thereof and receipts and payments (on revenue as well as on capital account) of the company.

When the statutory meeting is held, the directors must cause a list of members and their shareholders to be produced at the commencement of the meeting and it has to remain open and accessible to any member of the company during the continuance of the meeting.

If the statutory meeting is not held, or the statutory report is not *filed* with the Registrar, a member may petition to the Court for the winding up of the company. But the Court may, instead, order the meeting to be held or the report to be *filed* [Section 444 (3)].

2. **Annual General Meeting :** Every company without any exception, must hold, in addition to other meetings a general meeting styled as Annual General Meeting specified as such in the notices calling it, at intervals of time and in accordance with the provisions contained in Section 166. The first annual general meeting must be held within 18 months of the date of incorporation and it shall not be necessary to hold any annual general meeting in the year of its incorporation or the following year. Subsequent annual general meeting must be held every year, but the interval between any two annual general meetings must not be more than 15 months. This provision is intended to enable the company to make up its fiirst set of accounts for a longer period than what it wishes to be its financial year in cases

where the first day of such year does not correspond with the date of its incorporation and present them in time for the first annual general meeting. The Registrar may, for special reasons, extend the time for the holding of the meeting (excepting the first) by a period not exceeding three months. Any class of companies can be exempted from the operation of Section 166 by the Central Government. A public company may, by its articles, fix the time of its annual general meeting and may, by a resolution passed at one annual general meeting, fix the time of its subsequent annual meetings. A private company which is not a subsidiary of a public company may fix the time and place of its annual general meeting by the articles and also by a resolution agreed to by all the members.

Students should note that the annual general meeting must be held during business hours, on a day that is not a public holiday and must be held at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated. But if any day is declared by the Central Government to be public holiday after the issue of the notice convening such a meeting, it shall not be demeed to be a public holiday in relation to the meeting [Section 2 (38)].

If a default is made in the holding of the annual general meeting, the Central Government, on the application of any member of the company, may call or direct the calling of a general meeting of the company and for this purpose, the Central Government is given wide powers in respect of calling, holding and conducting the meeting (Section 167). The Act prescribes in respect of a default a fine up to Rs. 5,000 or for its continuance, up to Rs. 250 for every day of the default (Section 168).

It is an offence under the Companies Act not to hold the annual general meeting within the prescribed time [*Smedley* v. *Registrar of Companies* (1919), I.K.B. 971]. A company may put forward the excuse that the annual general meeting could not be held, because the annual accounts of the company were not ready for being laid before the meeting. Such an excuse is legally unacceptable for such a failure is itself an offence [*In re. E. Sombrero Ltd. 1958*, 3 W. L. R. 349]. But such a default would not be punishable if the account books of the company were seized by the police, thereby rendering the directors unable to call the annual general meeting [*In re. Asia Udyog Pvt. Limited 1961*, 31 Comp. Cas. 260]. In view of this legal position, though the opening words of Section 220 indicate that the balance sheet and profit and loss account required to be filed with the Registrar must be such as have been laid before the annual general meeting, the law does not exonerate the company or its directors from performing their statutory duty in filing the balance sheet and profit and loss account within the stated time merely because no annual general meeting was held. Therefore, the company and its directors would be liable to pay penalty for their failure to file the statements of the account with the Registrar even if the annual general meeting has not been held at which these would have been laid [*Ramchandra & Sons Pvt. Ltd.* v. *State 1966*, 36 Comp. Cas. 585, *Dulal Bhar* v. *State of West Bengal*, (1962), 32 Comp. Cas. 1143, *Sevaram Pansari* v *Registrar of Companies* (1964) 35 Comp. Cas. 31]. Failure to lay the statements of

account before the members of the company at the annual general meeting and the failure to call the annual general meeting itself are two distinct and a separate offences. Conviction under Section 166 is no bar to a further conviction under Section 210 (5) for failure to lay before the annual general meeting the balance sheet and profit and loss account as required under Section 210 (i) in respect of the same year.

Central Government's power v. *Company Law Board's power regarding general meeting* : The chief difference between the powers of the Central Government and those of a C.L.B. in respect of general meetings of a company lies in the fact that the Central Government's power is confined to the calling of the annual general meeting and that the C.L.B. may call any general meeting but not the annual general meeting.

Under Section 167, the Central Government is empowered to call, or direct the calling of a general meeting of the company, where any default has been made in holding *an annual general meeting*. Where this general meeting is held, it is deemed to be an annual general meeting of the company. Under section 186, the C.L.B. is empowered to order a meeting of the company to be called, held and conducted in such a manner as the C.L.B. thinks fit, if for any reason it is impracticable to call meeting of the company, *other than its annual general meeting*, in the manner in which the meetings of the company may be called or to hold or conduct meeting in the prescribed manner.

The power of the Central Government is exercisable only on the application of a member of the company, whereas the power of the C.L.B. under Section 186 is exercisable on its own motion or on the application of any director, or of any member who would be entitled to vote at the meeting.

Both the Central Government and the C.L.B. may, in this connection, give such ancillary or consequential directions as to calling, holding and conducting of the meeting as they think expedient.

The directions referred to in the preceding paragraph whether given by the Central Government, or as the case may be, by the C.L.B., may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

3. Extraordinary General Meeting : If there are any important matters requiring consideration by the shareholders before the next annual general meeting is due to take place, the directors and even members in some cases may call an extraordinary general meeting. The procedure that the members should follow in this regard (under Section 169) is discussed hereunder.

A requisition for the calling of an extraordinary general meeting must be made by members holding not less than 1/10th of the paid-up share capital carrying voting rights at the date of requisition, in the case of a company having a share capital, and in the case of a company having no share capital, by such number of members as have not less than 1/10th of the total voting power of all the members having voting powers on the date.

The requisition must set out the matters for the consideration of which the meeting is being called and must be duly signed by the requisitions, and deposited

at the registered office of the company. Unless the director, proceed within 21 days from the date of the deposit of requisition to convene the meeting on a day not later than 45 days from the date of deposit of the requisition, the requisitionists may themselves call the meeting within three months from the date of the requisition, provided (a) the requisitionists, in the case of a company having a share capital, are holders of a majority in value of the paid-up share capital held by all of them, or those who hold not less than 1/10th of such paid-up capital of the company as at the date of the requisition carries the right of voting or, (b) if the company has no share capital, the requisitionists must be such as represent not less than 1/10th of the voting power of all the members having at the said date a right to vote in regard to that matter.

The business to be transacted at the extraordinary general meeting will be special in all cases [See Section 173 (1) (b)]. It is to be noted that even at an extraordinary meeting both ordinary and special resolutions can be passed.

4. **Procedure as regards holding of general meetings**: Section 171 to 186 contain provisions as regards the calling and conducting of general meetings of public companies and their subsidiaries which are private companies. You should read these generally and note the other matters described below. They also apply to non-subsidiary private companies unless otherwise specified therein or unless the articles of the companies otherwise provide.

(a) *Length of Notice*: A general meeting cannot ordinarily be called by giving less than 21 days' notice in writing excluding the day of service of notice and the day of the meeting [See Section 171 (1)]. The Delhi High Court held in *Bharat Kumar Dilwali* v. *Bharat Carbon and Ribbon Manufacturing Co. Ltd. and others* (*1973*) *43 Comp. Cas. 197*] that the expression "not less than 21 days, notice" appearing in Section 171 of the Act implied a notice of 21 whole or clear days' e.g., a period of 21 days excluding the day from which it ran and the day on which the notice expired. Part of the day, after the notice would be deemed to have been served, could not be added up to the part of the day immediately before the timing of the meeting so as to construe one day. Each of the 21 days must be a full or a clear day. Following the Supreme Court's interpretation of the expression "not less than one month" that the first day and the last day of the month had to be excluded, the day of service of the notice and the day of the meeting were excluded from the computation of 21 days.

An annual general meeting, however, may be called by giving a shorter notice with the consent of all the members entitled to vote at the meeting and, in the case of any other meeting, with the consent of members holding not less than 95 per cent of paid-up capital or, if the company has no share capital, not less than 96 per cent of the total voting power [Section 171 (2)]. Note that all members can similarly agree to the accounts being sent to them less than 21 days before the annual general meeting [Section 219 (1) proviso (c)].

As regards shorter notice for general meeting, let us consider a practical problem. According to Section 171 read with Section 170 it boils down to this that

a private company which is not a subsidiary of a public company can provide in its articles for holding the general meeting at a shorter notice than 21 days. Now, in view of this position of law, if the articles of the private company provide for 7 days' notice in lieu of 21 days, can a copy of the balance sheet, together with the profit and loss account, auditor's report, etc., be also sent to its members for consideration at the annual general meeting along with notice of such meeting ? Does Section 219 need any amendment to bring it in conformity with Section 171 read with Section 170 ?

According to the proviso (c) to Section 219 (1), statements of account, auditor's report together with all necessary annexures or attachments can be sent to members less than 21 days before the date of meeting only if so agreed to by all members entitled to attend and vote thereat. Seemingly, this provision is in conflict with that of Section 171 read with Section 170. But this conflict is perhaps not unintentional and irrational. The formalities prescribed by Section 171 and Section 219 are independent of one another ; the copies of the documents referred to in Section 219 are to be *despatched* also to person other than those entitled to receive the notice of the general meeting. Moreover, consideration of annual accounts, etc, cannot be treated as identical and hence at par with the consideration of other business coming up before the shareholders. Therefore, the shareholders must be given sufficient time to pursue the documents mentioned in Section 219.

(b) *Venue for general meeting* : Section 172 (1) makes a mandatory provision that every notice of meeting must specify the place and day and the hour of the meeting. Let us now visualise and consider a situation. Pursuant to a notice of a general meeting duly served on the members, some members appear at the scheduled place at the appointed day and time. To their *abject* surprise, they find that premises of the meeting had been demolished by fire. They dicide to hold—and in fact they do hold—the meeting in the adjacent building on the same day and time. Can the meeting be deemed to be valid ? The Act does not make any specific provision to deal with such an unusual situation. Nonetheless, we can try to tackle it by reference to the famous rule in *Foss* v. *Harbottle* was. The pre-eminently procedural character of the rule in *Foss* v. *Harbottle* was clearly expressed in the following restatement of the rule by Jenkins L.J. in *Edwards* v. *Halliwell* (*1950*), *2 All E.R. 1064, 1066* [and see Russell L.J. in *Heyting* v. *Dupont* (*1968*) *1. W.L.R. 843, 848*].

"The rule in *Foss* v. *Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transanction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that: if a mere majority of the members of the company or association is in favour of what has been done, then *cadit questio*" (i.e., the matter admits of no further argument).

On the basis of this principle, when the different venue was unanimously agreed upon in the exigencies of the situation, the matter admits of no further

argument, and the meeting could be deemed to be valid. Besides, when the period of notice—which is more vital than venue for forming a judgment about the matter to be discussed in the meeting—shorter than statutory period prescribed by Section 171—can be agreed upon (i) by all the members entitled to vote at annual general meeting, and (ii) by members holding at least 95% of such part of the paid-up capital of the company having a share capital as gives a right to vote at a meeting other than the annual general meeting, or (iii) by members having at least 95% of the total voting power exercisable at the meeting other than the annual general meeting then there is no reason why the venue referred to in the problem stated above could not be changed on an unanimous agreement of the members. Therefore, the meeting in question could be deemed to be valid.

(c) *Resolution requiring special notice*: For certain purposes, the Act requires a special notice, i.e., 14 days, to be received by the company from a shareholder of his intention to move the resolution, either as an ordinary or as a special resolution. After the receipt of the notice, the company must immediately issue a notice to the shareholders in this regard, not less than 7 days before the meeting either by serving it on them or through an advertisement in the newspaper having an appropriate circulation or in any other mode allowed by the articles (Section 190).

The matters in respect of which special notice is required are : (1) for appointing a person as auditor at the annual general meeting other than the retiring auditor for providing expressly that the retiring auditor shall not be re-appointed [Section 225 (1)]; (2) for removing a director before the expiry of the period of his office and appointing some one in the place of the director so removed [Section 284 (2)] ; and for appointing certain person who cannot be appointed in the ordinary course as director provided for in Section 261 [Section 261 (2)].

Now suppose, at the annual general meeting of a company a resolution is proposed to be moved to the effect that the retiring auditors shall not be re-appointed. What would be the duty of the company and the right of the auditor in the circumstances ? From the law discussed above, the *duty* of the company may be summed up as follows :

(i) On the receipt of the 14 days' special notice, the company must forthwith send a copy thereof to the retiring auditor [Section 225 (2)].

(ii) Where the retiring auditor makes a written representation, not exceeding a reasonable length, to the company and requests the company to notify such representation to the members, the company is bound to state in any notice of the resolution given to the members, the fact of the representation having been made and send a copy of the representation to every member to whom notice of the meeting is sent—whether before or after a receipt of the representation by the company. Moreover, the company is bound by this duty if the representation has not been received too late. If the representation has been received too late, the company will be relieved of this duty. But in such a case, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

The auditor's right to get the copies of the representation sent out to members or read out at the meeting is hedged in by the provision that if the Court is satisfied, on the application of the company or any other *aggrieved* person, that the right is being abused to secure needless publicity for a defamatory matter, the Court may order that the representation may not be circularised or read out. The Court may further order that the company's costs on such an application should be paid by the auditor, in whole or any part even though he is not a party to the application [Section 225 (3)].

The *rights* of the auditor in this context are as follows :

(1) It follows from paragraph (ii) above that the auditors has the right to make representation to the company and to request it to notify it to the members.

(2) The auditor has also the right to be heard orally at the meeting of the shareholders.

(3) Where a copy of the representation has not been despatched as aforesaid because it was received too late or because of the company's default, the auditor may without prejudice to his right to be heard orally, require that the representation be read out at the meeting.

(d) *Contents and manner of service of notice*: Section 172 deals with the contents and manner of service of a notice and the persons on which it is to be served. Every notice of a meeting of a company must specify the place, date and hour of the meeting ; also it should contain a statement of business to be transacted thereat. This statement of business is known as the Agenda. The aforesaid notice must be given to every member of the company, to person entitled to shares in consequence of death or insolvency of a member and also to the auditors of the company (only in the case of annual general meeting).

The notice may be served personally or sent through post to the registered address of the members and, in the absence of any registered office in India, to be addressed, if there be any, within India furnished by him to the company for the purpose of serving notice to him. Service through post shall be deemed to have been effected by correctly addressing, preparing and posting the notice. If, however, a member wants the notice to be served on him under a certificate or by registered post with or without Acknowledgement Due and has deposited money with the company to defray the incidental expenditure therefor, the notice must be served accordingly ; otherwise service will not be deemed to have been effected. Service on the joint holders may be made by serving it on the one whose name appears first in the register of members. Service of notice shall be deemed to have been effected in the case of notice of a meeting on the expiry of 48 hours since the posting of the same. When a notice is advertised in a newspaper circulating in the neighbourhood of the registered office of the company, it is regarded as having been served on the day on which the advertisement appears, on every members having no registered address in India and who has not supplied to the company an address within India for giving notice to him. Note that Section 53 applies to all documents and not merely to service of notice of meetings (Section 53).

It should be noted that an improper or insufficient notice, as well as absence of notice, may affect the validity of a meeting and render the resolutions passed at the meeting ineffective [*See Boschoek Proprietary Company* v. *Fuxe* (*1906*) *1 Ch. 148 Ballu* v. *Oriental Telephone Company* (*1915*) *1 Ch. 503*]. But the accidental omission to give notice does not invalidate proceeding at meeting [Section 172 (3). Further, if a notice of a meeting is published as a newspaper advertisement, the statement of material facts, referred to in Section 173, need not to be annexed, but the fact that the statement shall be forwarded must be mentioned.

A notice must clearly specify the business which is to be transacted at the meeting to which the notice relates ; otherwise the notice would be bad. It should make a full and frank disclosure to the shareholders of the fact, on which they would be expected to vote [*Tiessen* v. *Henderson* (*1889*) *1 Ch. 861* ; *Narayanlal Bansilal* v. *Manekji Patel Mfg. Company. 93*, Bom. L.R. 556].

(c) *Special and Ordinary Business* : In the case of an *annual general meeting* the items of business relating to : (i) the consideration of the accounts, balance sheet and the reports of the Board of Directors and auditors ; (ii) the declaration of a dividend ; (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of and fixation of the remuneration of the auditors, are regarded as ordinary business. All businesses, other than those under (i) to (iv) transacted at the meeting are deemed to be special. In the case of any other meeting, all business shall be deemed special. By implication, therefore, all business transacted at an extraordinary general meeting are special.

Where the business to be transacted at the meeting is considered as special, an explanatory statement must be annexed to the notice convening the meeting setting out all material facts concerning such each item of business, nature of the concern or interest, if any, of every director, and the manager (Section 173). Where the special business relates to any other company the extent of shareholding interest of every director, etc. is necessary, to be disclosed only if the shareholding interest is not less than 20 % of the paid-up capital of that other company. (Students should not confuse 'special business' with 'special resolution').

If the notice convening the meeting (whereat special business will be transacted) does not state the nature of the special business, the meeting would be deemed to have been convened irregularly. Consequently, that special business cannot be dealt with at the meeting. Where the notice convening an extraordinary general meeting had furnished insufficient particulars as to the special business to be transacted thereat, and the member passed a resolution at the meeting, the directors were restrained by the Court's injection from acting on that resolution. This was because the insufficient particulars furnished prevented the members from preparing their mind prior to the meeting so that they could exercise their judgment at the meeting in a proper manner [*Jain* v. *Kalinga Tubes, 1965 I.S.C.J. 540* : *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot, 1917 A.C. 607*].

Section 173 is designed to secure that facts having a bearing on the issue on which the shareholders have to form their judgment, are brought to the notice of the shareholders so that they can exercise intelligent judgment.

(f) *Quorum* : This Latin word denotes the number of persons, out of the whole body of members who have actually attended the meeting, which must be present to make the proceeding at a meeting valid. Unless the articles provide for a large number, five members, personally present in the case of a public company (other than a public company which has become such by virtue of section 43 A) and two in the case of any other company from the quorm for a general meeting (Section 174). The provision is calculated to remove a practical difficulty in respect of Section 43A public companies which may have less than 5 members. Therefore, two members in these cases will be sufficient.

In the case of meeting of a special class of shareholders, Annexure B to the companies (Central Government's) Rules, 1956, applies and fixes the quorum at five members of that class present either in person or by proxy in the case of public companies, and two members in the case of a private company. In the case of meeting of debentureholders or any class of debentureholders, the quorum is uniform, *i.e.*, five debentureholders, personally present.

The meeting cannot proceed with business in the absence of a quorum. Unless the articles of the company provide otherwise, if within half-an-hour from the time appointed for holding the meeting of the company, a quorum is not present then the meeting shall be dissolved, if it has been called upon by the requisition of members. In any other case, the meeting shall be adjourned to the same day in the next week, at the same time and place, or to such other day and such other time and place as the Board may determine. If at such an adjourned meeting a quorum is not present within half-an-hour from the time appointed for the meeting, the member present shall constitute the quorum (Section 174). In the context of Section 175, let us now grapple with some practical problems. Suppose, the articles of X & Co. Ltd. provide thus, "In the event of the quorum being not present within half-an-hour from the time scheduled for the annual geaeral meeting, the meeting shall stand dissolved" and then quorum is not formed within half-an-hour from the time fixed therefor.

(a) In the circumstance, what further steps are necessary to hold the annual general meeting ? By implication of Section 174 (2), if the articles of the company otherwise provide, the meeting cannot be adjourned to the same day at the next week, at the same time and place or to such other day and at such other time and place as the Board determines. To resolve this *impasse*, till any judicial ruling is given, the annual general meeting should be called anew in the circumstances of the above-mentioned case.

(b) Now, if it is to be convened afresh as opined above, will a fresh resolution of the Board be needed ? Since a resolution is taken at a Board meeting, fixing the date of the annual general meeting and since the annual general meeting will have to be convened afresh in the circumstances of the case, it seems that a fresh resolution of the Board fixing the date of the new annual general meeting would be required.

(c) What will be the position of the retiring directors—will they cease to be directors from the date at which the general meeting could not be held for want of quorum and consequently stood dissolved as per the articles as aforesaid or will they

remain directors till date of the fresh annual general meeting which was convened subsequent to the first one ? If the newly convened annual general meeting is held well within the statutory period, then the rotational directors may remain in office till the date of the second meeting so held. If, however, the meeting is called on the last day of the statutorily prescribed period and the meeting could not be held for want of quorum and a fresh annual general meeting is convened as a result, then the rotational directors might be allowed to retain their office till the date of the second meeting with the prior permission of the Registrar of Companies.

The quorum for a meeting of the Board of Directors of a company is one-third of its total strength (any fractioned contained in that one-third being rounded off as one), or two directors, whichever is higher. Any interested director will not count for quorum. If at any time the number of interested director exceeds or is equal to two-thirds of the total strength, the number of the remaining directors, *i.e.*, the number of the directors who are not interested, present at the meeting, provided their number is not less than two, shall constitute the quorum during such time (Section 287). In the absence of the quorum, the meeting cannot be held ; it stands adjourned, unless the articles otherwise provide, to the same day in the next week at the same time and the same place, or if that day is public holiday, then to the next succeeding working day at the same time and place (Section 288); the provision of Section 285 (in the matter of Board meetings being held at least once in every three calendar months) is not deemed to have been contravened merely because the meeting, otherwise lawfully convened, could not be held for want of a quorum.

Before we conclude our discussion on quorum, we should consider a little intricate problem. Suppose, the same person is attending a general meeting of a company both as a proxy for some one and as a representative of another company which is a member of the company, would he be counted as one person or two persons for the purpose of quorum ? You have noticed above that under Section 174, the quorum for a company meet must be constituted by members alone (4 or 2 in the case of public or private company respectively). By implication of Section 176 which we shall discuss in detail later on a proxy appointed by a member of a company is not a member himself. A person duly appointed under Section 187 (which also we shall discuss later on) as the representative of the body corporate, which is a member, shall be entitled to exercise the same rights and powers (including the right to vote by member of the conpany. It, therefore, follows that the representative is a member personally present for the purpose of quorum and voting by show of hands and is not merely in the position of a proxy appointed by a shareholder. He will have the right to speak, unlike the proxy. But as a proxy he cannot be treated as a member present. Therefore, person in question would be counted as one person for the purpose of quorum.

(d) *Voting and the right to demand a poll* : Vote is taken in the first instance by a show af hands (Section 177) ; each member has one vote. The shareholders present at the meeting indicate their views by raising their hands. As voting by a

show of hands may not always reflect the opinion of members upon a 'value' basis, Section 179 provides for the demand of a poll.

Before or on the declaration of the result of the voting on any resolution by a show of hands, the chairman may order *suo moto* that a poll be taken but when a demand for poll has been made, he must do so. The demand to be valid must be made (a) in the case of the public company by at least five members having the right to vote and present in the person or by proxy ; (b) in the case of a private company, by one member having the right to vote, present in person or by proxy, if not more than 7 persons are personally present and by two members, if more than seven persons are personally present ; (c) by any member or members present in person or by proxy and having at least 1/10th of the total voting power in respect of the resolution ; (d) by member or members holding shares conferring a voting right, being shares on which an aggregate sum has been paid up which is not less than 1/10th of the total sum paid up on all the shares conferring that right (Section 179).

Note that by implication of the proviso (c) to Section 176 (1), a proxy can, if the articles so provide, vote even on a show of hands.

(g) *Proxies* : A proxy is an instrument in writing executed by a shareholder authorising another person to attend a meeting and to vote thereat on his behalf and in his absence. The term sometimes is also applied to the person so appointed.

Section 176 gives every shareholder, who is entitled to attend and vote, a statutory right to appoint another person as his proxy to attend and vote for him. But the proxy so appointed has no right of audience, *i e.*, he cannot speak. The proxy may demand or join in demanding a poll but (unless the articles otherwise provide) may vote only on a poll. In every notice convening a meeting of a company which has a share capital or the articles of which provide for voting by proxy, there must be included with reasonable prominance a statement that a member is entitled to appoint a proxy and thus a proxy need not be a member. Any provision in the articles requiring the instrument appointing a proxy to be lodged with the company more than 48 hours before a meeting in case of public companies and their subsidiaries which are private companies shall have effect as if 48 hours had been specified therein. No invitation can be issued by the company at its expense to appoint specified persons as proxies. But list of persons willing to act as proxies can be sent to all members.

It has already been observed that a proxy cannot speak at the meeting. But can he express his veiws in writing or through any other vehicle. The answer to this question is definitely in the negative. This is because if he is so allowed, a door might be open for the preparation of the mischief that Section 176 has been designed to guard against, by denying him the right of audience. A proxy is not a member or a shareholder ; he is simply an outsider. If proxies are allowed, the right of audience or are otherwise allowed to interrupt a company meeting, many members may appoint and brief professional persons as proxies. In that event the proceedings at the meeting may be undesirably prolonged. To eschew such a situation a proxy cannot also express his views in writing because it would be tantamount to speech.

You have noticed that the impact of Section 176 (3) is that a company is prohibited from providing in its articles a longer period than 48 hours from the date of the meeting for depositing proxies. By implication therefore, the company can provide for a shorter period than 48 hours without any restriction whotsoever. Now the question arises as to whether a proxy can be lodged before an adjourned meeting if it was not lodged 48 hours before the original meeting. According to Article 61 of Table A, an instrument appointing a proxy may be deposited 48 hours before an "adjourned meeting at which the person named in the instrument proposes to vote." Therefore, if the articles of company include Article 61 or any other similar provision then the proxy may be lodged even before the adjourned meeting. But if they do not so include, then of course the ruling in *Laren* v. *Thompson* (*1917 2 Ch. 261* will come to prevail. According to this ruling, a proxy cannot be deposited 48 hours before an adjourned meeting, since adjournment is just a continuation of the original meeting ; it ought to be lodged within the stipulated time before the original meeting.

Representations of corporations at meetings of companies and creditors : According to Section 187, a company, if it is a member of another company, may, by a resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company. The person so authorised is entitled to exercise the same rights and powers (including the right to vote by proxy) on behalf of the company which he represents as that company could exercise if it were an individual member of the company. These very rules will govern a case whether the company is a creditor (including a holder of debenture) of another company.

Representation of the President and Governors in meetings of companies to which they are members : The President of India or the Government of a State, if he is member of a company, may appoint such person as he thinks fit to set as his representative at any meeting of the company or at any meeting of any class of members of the company. Such appointee shall be deemed to be a member of such a company and he shall be entitled to exercise the same rights and powers (including the rights to vote by proxy) as the President, or as the case may be, the Governor could exercise as a member of the company (Section 187-A).

Declaration by persons not holding beneficial interest in any share :. Despite anything contained in Section 150, Section 153-B or Section 187-B, a person, whose name is entered, at the commencement of the Companies (Amendment) Act of 1974, or at any time thereafter, in the register of members of a company as the holder of a share in that company but who does not hold a beneficial interest in such share then he must, within such time and in such form as may be prescribed, make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such share [Section 187-C (1)] as introduced by the Companies (Amendment Act, 1974.)

A person who holds a beneficial interest in a share or class of shares of a company must make a declaration to the company. This declaration is to be made

either within 30 days, from the commencement of the Companies Amendment Act, 1975, or within 30 days after his becoming such beneficial owner, whichever is later. The declaration must specify the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed [Section 187-C (2)]. Whenever there is a change in the beneficial interest in such shares, the beneficial owner must, within 30 days from the date of such change, make a declaration to the company in such form and containing such particulars as may be prescribed [Section 187-C(3)].

Within 30 days from the date of the receipt of any of the declarations mentioned above, the company must make a note of it in its register of members and file a return with the Registrar in the prescribed form in respect of such declaration. This requirement shall have to be complied with irrespective of anything contained in Section 153 [Section 187-C (4)].

If the person who is required to make the said declaration fails to do so without any reasonable excuse, he shall be punishable with fine extending to Rs. 1, 00 for every day during which the failure continues. If the company fails to comply with the provisions of Section 187-C, then the company and every officer thereof who is in default, shall be liable to the same punishment as aforesaid [Section 187-C (5)].

Any charge, promissory note or any other collateral agreement created, executed or entered into in relation to any share by the ostensible owner thereof, or any hypothecation by the ostensible owner of any share, in respect of which a declaration is required to be made under the foregoing provisions of this Section, but not so declared, shall not be enforceable by beneficial owner or any person claiming through him. [Section 187-C (6)].

Nothing in Section 187-C shall be deemed to prejudice the obligation of a company to pay dividend in accordance with the provisions of Section 206 and the obligation shall, on such payment, stand discharged [Section 187-C(7)].

It will have been observed from the foregoing exposition of law that it has been made obligatory that all *benami* holdings of share in existence at the commencement of the Companies (Amendment) Act of 1974 must be declared both by the *benamidar* and by the beneficial owner. Likewise, all beneficial interest in shares in future is also to be declared.

Investigation of beneficial ownership of shares in certain cases : The Central Government may appoint one or more inspectors to investigate and report as to whether the provisions of Section 187-C have been complied with. On such appointment, the provisions of Section 247 shall apply to such investigation as if it were an investigation ordered under that Section [Section 187-D, as introduced by the Companies (Amendment) Act of 1974].

6. **Resolutions :** A resolution is a proposal moved by a [illegible] formally resolved upon by the meeting. In the Act, the term "resolution" is used without distinction, to mean both the 'motion' (which has been proposed) and the resolution (the decision of the meeting).

The resolutions of the members of a company may be either Ordinary or Special. A resolution passed by a simple majority of votes cast in favour thereof either on a show of hands or on a poll is known as an ordinary resolution.

A special resolution is one passed by a majority of not less than three-fourths of the votes cast by members entitled to vote either on a show of hands or on a poll, at a general meeting of which notice has been duly given, specifying the intention to propose the solution as a special resolution (*Section 189*) The Act itself requires that certain business must be transacted by special resolution *e.g.*, Sections 17, 21, 31, 81 (IA), & (3), 99, 100, 145, 149 (2A), 208, 237, 261, 309 (1) & (4), 314, 370, 370A, 375, 433, 484 and 550 and the articles may further make provisions in this regard.

7. **Circulation of members' resolutions and statements :** Students should carefully note the circumstances in which the members can make use of the administrative machinery of a company introducing resolutions for consideration at any annual general meeting or for circulation statements in regard to any resolution or be proposed at any extraordinary general meeting or business to be dealt with at that meeting. Such circumstances are stated below :

The company on the receipt of the written requisition by : (i) such number of members as represents not less than 1/20th of the total voting power of all members having at the date of the requisition, the right to vote on the resolution or business to which the requisition relates ; or (ii) not less than 100 members holding shares on which there has been paid up as an aggregate sum of not less than Rs. 1 lakh in all and having a right to vote, must (a) give to members entitled to have notice of meeting sent to them, the notice of any resolution which may properly be moved and which is intended to be moved at that meeting ; and (b) circulate to members who are entitled to have notice of any general meeting, any statement is not more than 100 words in regard to the proposed resolution or the business to be dealt with at the meeting.

The expenditure in this regard must be borne by the requisitions and paid to the company. The company is not bound to give notice of any resolution or to circulate any statement unless (a) a copy of the requisition signed by the requisitionists is deposited at the registered office of the company—(i) in the case of a requisition requiring notice of a resolution, not less than 6 weeks before the meeting ; and (ii) in the case of any other requisition, not less than 2 weeks before the meeting ; and (b) a sum reasonably sufficient to meet the company's expenses has been deposited along with the requisition.

It is also not binding upon the company to circulate any resolution or statement when, on its application or that of an aggrieved party, the Court decides that it contains defamatory matter.

In the case of a banking company, if the Board of Directors opines that the circulation of a statement will be detrimental to the interests of the company, it need not circulate the same.

Notwithstanding any provision to the contrary in the company's articles a resolution in respect of which notice has been given by a member as aforementioned, may be dealt with at an annual general meeting; also any incidental omission to serve notice upon one or other members will not invalidate the proceedings. (Section 188).

Passing of resolution by circulation : According to Section 289 of the Act, a resolution shall not be deemed to have been passed by the board of directors or by a committee thereof by circulation, unless (i) the resolution has been circulated in draft, together with the necessary papers (if any) to all the directors or to all the members of the committee then in India (not being less in number than the quorum fixed for a meeting of the Board or committee, as the case may be); (ii) the resolution has been approved by such of the directors as are then in India, or by a majority of such of them as are entitled to vote on the resolution.

A resolution, passed by circulation as aforesaid, should be recorded in the minutes of the next Board meeting in order to ensure its authenticity.

8. **Registration of resolution and agreement** (Section 192) : Either printed or typewritten copies of all special resolutions as well as certain ordinary resolutions and agreements, some of which are described below, together with explanatory statement under Section 173 are required to be filed with the Registrar of Companies within 30 days after the passing or making thereof.

(a) Special Resolutions.

(b) Resolution agreed to by all the members of a company, which, if not so agreed to, would have been ineffective unless they had been passed as special resolutions.

(c) Any resolution of the Board of Directors or agreement executed by a company relating to appointment, re-appointment, renewal of appointment or variation of the terms of appointment of the managing director.

(d) Resolutions or agreements agreed to by all the members of any class of shareholders but which, if not agreed to, would have been ineffective for their purpose unless those had been passed by some particular majority or otherwise in some particular manner, and all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all of them.

(e) Resolutions requiring a company to be wound up voluntarily, passed under Section 484(1).

(f) Resolutions passed under Section 293 (1)(a)(d)(e).

(g) Resolutions approving appointment of sole selling agents under Section

294 or 294AA on appointment of sole selling agent.

(h) Where articles have been registered, a copy of every resolution which alters the articles and of every *agreement* shall be embodied in the articles. Where articles have not been registered, a printed copy of every such resolution of agreement shall be forwarded on request of member on payment of one rupee [Section 192 (2) and (3)].

(i) Copies of the terms and conditions of appointment of a sole selling agent appointed under Section 294 or of a sole selling agent or other person appointed under Section 294AA.

It may be noted that Form No. 23 of the Companies (Central Government's) General Rules and Forms, 1956 prescribe the manner in which copies of the aforesaid resolutions and agreements are to be certified and filed with the Registrar.

9. **Minutes** : The minutes represent a record of business transacted at a meeting. It is obligatory for every company to cause minutes of all proceedings of the general meeting of the Board or of committees of the Board to be entered in the Minute Book. The minutes of each meeting must contain a fair and correct summary of the proceedings. The appointment of officers made at the meetings will have to be included in the minutes.

In the case of the meeting of the Board or of a committee thereof, the minutes must contain the names of directors present thereat and the names of directors who dissent from, or do not concur in, any resolution. It, therefore, follows that a director can insist upon his dissent being recorded in the minutes of the Board meeting. But the director cannot so insist in the case of a general meeting as Section 193 makes no such provision.

The Chairman of the meeting has, however, unfettered discretion in the matter of excluding from the minutes any matter which could reasonably be regarded as defamatory of any person, or is irrelevant or immaterial, or detrimental to the interests of the company (Section 193). The minutes of the meeting must contain a fair and correct summary of the proceedings thereat. But it is not necessary unless it affects fairness to *mention* the names of members who participated in such discussion.

Minutes must be entered within 30 days of the conclusion of the meeting concerned. They have to be written by hand and typed minutes cannot be pasted in the Minute Book ; in other words, minutes cannot be kept in loose-leaf system even though adequate safeguards are taken against falsification, the reason being that Section 193 (1B) has expressly prohibited making of entries in "any other manner" except in the manner stated in the section. Every page of the books, with pages consecutively numbered, should be initialled or signed and the last page shall be dated and signed : (a) in the case of Board or Committee minutes by the Chairman of the meeting or the Chairman of the succeeding meeting ; (b) in the case of minutes of general meeting by the Chairman of the meeting within the

aforesaid period of 30 days of the conclusion of the meeting or in the event of death or inability of the chairman by the director duly authorised for the purpose. In this context let us consider a concrete case. The chairman of the Board, having presided over the company's annual general meeting, left India immediately thereafter. He is likely to come back only after a couple of months. Now how are the minutes signed and dated ? By virtue of Section 193 (1 A) (b), minutes of proceedings of a general meeting can be dated and signed, in the event of the death or inability of the Chairman of that meeting within a period of 30 days, by a director duly authorised by the Board for the purpose. In the circumstances contemplated by the question, therefore, a Board meeting has to be convened and one of the directors present thereat be authorised to sign and date the minutes of the annual general meeting.

Any such minutes, when kept according to provisions mentioned above, are evidence of the proceedings (Section 194). It has been held in *Kerr* v. *Motiram* (1940) 1 Ch. 657 that should be the articles provide that the minutes signed by the chairman shall be conclusive evidence without any further proof of the facts therein stated, evidence cannot be led in to contradict the minutes.

A director, who is present at a meeting at which the minutes of a prior board meeting are confirmed, is not thereby made responsible for what was done at the prior meeting [*Re. Land Allotment Co.* 1894 1 Ch. 615].

Any member has the right to inspect, free of cost, during business hours at the registered office of the company, the books containing the minutes of general meeting of the company held after 15th January, 1937. Any member shall be entitled to be furnished within seven days after his request with a copy of any such minutes on payment of thirty-seven paise for every hundred words or fraction thereof. Penalties are imposed for defaults, and the Court has the power to order immediate inspection of the minutes or to direct that copies shall be furnished (Section 196). These statutory rights of the members are exercisable only in respect of minutes of general meetings. Note that the fee for copies, mentioned above, need not be prepaid unlike the copy of a document filed with the Registrar to obtain which the fee for Re. 1 for every one hundred words must be prepaid [Section 610 (1) (b)].

Class Meeting : Such meetings are of shareholders of a particular class of shares. These must be convened whenever it is necessary to alter or change the rights or privileges of that class as provided by the articles. For effecting such changes, it is necessary that these are approved at a separate meeting of the holders of those shares and supported by special resolution. There can also be compromise with creditors or classes of them under Section 391 and this must be supported by a majority in number representing three-fourths in value of creditor members or classes of them.

Meetings of Debentureholders : Such meetings are usually held according to the conditions of the debenture trust-deed or any other provisions made at the time of their issue for altering the conditions of the debentures.

Meetings of creditors otherwise than in a winding up : A company can make a compromise with its creditors only according to the provisions contained and the procedure prescribed under Sections 391 to 393 which require a meeting of creditors or class of creditors or of the members or class of members (as the case may be) to be held.

BOARD MEETING

Frequency of Board Meeting : Section 285 requires the Board to meet at least once in every calendar months irrespective of whether it is the Board of a public company or a private company. And at least four such meetings must be held in every year. However, the Central Government may by notification in the Official Gazette, direct that these provisions will not apply in relation to any class of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

It will be worthwhile to consider to question here. *Is a director bound to attend the meetings of the Board* ? No, he is not so bound. But nonetheless he will be guilty of breach of duty if he fails to attend Board meetings with reasonable regularity without sufficient cause being shown for non-attendance. Wilful non-attendance on his part may give rise to his liability on ground of negligence if it is patently prejudicial either to the company or to the general body of shareholders. Fairly frequent absence from the Board meeting may, however, be excused if the entire control is exercised by a single director or if the Board is pretty large in number [*Re. Denham & Co. D. 25 Ch. D. 752* ; *Marquis of Bute's case* (*1892*) *2 Ch. 100*]. The fewer the directors, the more onerous is the duty to attend.

Although a director need not attend each Board meeting unless the articles provide otherwise, yet his continuous non-attendance say two attendances followed by two non-attendances, again followed by one attendance and so forth just by way of a guard against infringement of the provision of [Section 283 (i) (g)] may render him guilty of breach of turst which may be committed by other directors [*Charitable Corporation* v. *Sutton 2 Atk. 400*]. For example, the other director or directors take the advantage of the aforesaid non-attendance by the director and dissipate the company's assets through wasteful and other improper expenses. The absenting director would be responsible for the loss caused to the company, if his presence could otherwise stop their wrongful acts resulting in the said dissipation of assets.

It is true that Section 285 does not prescribe any penalty for non-compliance with the requirements of the Section. Nevertheless, Section 622A may be invoked to deal with such a situation.

If a director is improperly excluded from meeting by the Board, he has an equitable remedy by way of injunction through a suit [*Hayes* v. *Bristol Plant Hire Ltd.* (*1957*) *I. A. E. R. 685* : *Pulbrook* v. *Richmond Mining Co* (*1878*) *9 Ch. D. 610*]. But he will be deprived of this remedy by Court's injunction if he has been excluded by the general meeting itself [*Read* v. *Astoria Garage Streatham Ltd.* (*1952*) *Ch. 637* (*C. A*)—(*1952*) *3 All. E. R. 252*]. But even if he remains aggrieved by the said

general meeting resolution, shall he be left out without any remedy whatsoever ? We feel that he should not be debarred from seeking other remedies like damages; that is his remedy should be an action for damages.

Suppose, A claims to be a director of X & Co. (P) Ltd. but the company's records *prima facie* reveal that A was not appointed as such. In such a case according to a Supreme Court decision in [*Jalan Ram Autar* v. *Coal Producers (P) Ltd. (1970) 40 Comp. Cas. 715 (S.C.)*] the onus lies on A to prove his claim of directorship before any interim relief can be granted to him by way of injunction.

According to a decision in *Burden* v. *Sinclair 105 S. J. 586*, where there is a suit for a declaration that a director has been validly removed from his office, an interim injunction will not be granted.

In the context of Section 285, let us consider another intricate issue. Suppose, a meeting of the Board has been convened within the prescribed period in strict conformity with the said Section but, for want of quorum, the said meeting could not take place. In such a situation, the meeting automatically stands adjourned by virtue of Section 288 (1) till the same day in the next week, at the same time and place. And if that "same day" is a public holiday, then the meeting stands adjourned till the next succeeding day which is not a public holiday, at the same time and place. And because of this adjournment the meeting is obviously held after the period specified in Section 285. In terms of Section 288 (2) which is not clearly couched, a company shall not be deemed to have contravened the provisions of Section 285 where the meeting does not take place for want of quorum. In *view* of these legal provisions, a pertinent question for our consideration comes up. For holding the next Board meeting, *which date should we take into account for the purpose of calculating the statutory period of once in every three months*,—whether the date of the original meeting which was adjourned for want of quorum or the adjourned date at which the meeting was actually held ? A practical difficulty arises in this regard owing to the silence of the Act on this point. Our confusion gets worse confounded when we come across Section 191 which states that where a resolution is passed at an adjourned meeting, *inter alia*, of the Board of Directors of a company, it must "for all purposes", be deemed to have been passed at the date of the adjourned meeting not on an earlier (*i.e.*, the original) meeting. For resolving our question indicated in italics above, should we take the indirect provisions of Section 191 and conclude, by correlating the phrase "for all purpose" with the expression "be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date" appearing in Section 191, that for holding the next meeting of the Board, the statutory period should be calculated from the date at which the adjourned meeting was held ? There is no judicial decision to warrant this conclusion. However, according to Buckley's Companies Act, (p. 339, 12th Edition), except as regards the meetings of the three classes referred to in Section 144 of the English Companies Act (corresponding to our Section 191 which is a verbatim copy of the English Section), the legal fiction of continuity of the original meeting and all adjournments or any legal consequence emanating therefrom remains unaffected by Section 144 of the English Act. This is so notwithstanding the phrase "for all purposes", appearing in section 144. Inasmuch as our Section 191 is the verbatim copy

of Section 144, we can rely on this treatise. And relying thereon, we may conclude *that the continuity of the original meeting* will remain unhampered and therefore for *the purpose of holding the next Board meeting* the statutory period of "every theer months" *should be computed from the date of the original meeting was adjourned for want of quorum.*

Notice of meetings : Notice of every Board meeting has to be served in writing on each director for the time being in India, and at his usual address in India to every other director. Every officer of the company whose duty is to serve the notice as aforesaid and who fails to do so shall be punishable with fine extending to Rs. 100 (Section 286). It is usually the secretary of a company on whom it casts the duty to serve the notice as aforesaid. It should be noted that the company is not liable for the default in the service of the said notice ; it is only the officer in default who is subject to the said penalty.

Where a director goes abroad for a period of more than 3 months and an alternate director has been appointed in his stead under section 313 (1), to whom should the notice of Board be given to the "original director" or to the "alternate director"? Although there is no legal precedent in this regard, we nonetheless feel that prudent practice would demand, on strictly construing Section 286, that the notice should be served on the alternate director as well as on the original director who is outside India for the time being.

In the post-Independence period, there was an upsurge of foreign consortia. Articles of foreign collaborations frequently provide that notice of Board meetings should be sent by Air Mail to foreign directors so that they may be able to attend the statutorily prescribed minimum number of meetings (*i.e.*, 3 consecutive meetings without obtaining the leave of absence from the Board) so as to prevent the vacation of their office due to continuous non-attendance under Section 283 (1) (g) of the Act. *Now a vital question crops up as to whether such a provision in the articles of foreign collaborations is valid,* because of the provisions of Section 286 (1) which, as we have already stated earlier, requires the service of the said notice on a director out of India at his usual address in India. Such a question is *not free* from doubt. In England, such a notice is required to be given to a director abroad, only when he is within easy reach, else not. But a moot point arises whether a foreign director falls *within* the purview of the expression "a director other than a director for the time being in India". On a scrutiny of the Act, we find that whereas Section 53 provides for the service of documents like notices, etc., on members by a company there is no such or similar Section providing for services of notice on directors.

No particular form has been prescribed for the above-mentioned notice of Board meetings. It has been held in *A.L.A.R. Arunachalam Chettiar v Kaleewarer Mills Ltd. (1957) I. M.L.J. 254=A.I.R. 1957 Mad. 309* that where articles of the company provide that there will be a meeting on the first Saturday of every month, there will be no necessity of the service of the notice under Section 286 (1) inasmuch as a provision in the articles is sufficient compliance with Section 286 (1).

Suppose, the above-mentioned notice, as required by Section 286 (1), has not been served. In such a situation the proceedings at the meeting shall not become invalid provided (i) all the directors attend the meeting and do not raise any objection to the non-service of the notice ; or (ii) where the absent directors make no complaint about the want of notice, particularly when the proceedings are *ratified* at a subsequent meeting whereat the absentee directors are present [*Re. State of Wyoming Syndicate (1901) 2 Ch. 431*].

Let us consider another situation. Suppose, a director states that he will not be able to attend the next Board meeting. In the *circumstances* is there any necessity to give the notice under Section 286 (1) ? As per the decision in *Re. Portuguese Consolidated Coffee Mines Steel's Case 42 Ch. D. 160*, the answer is 'yes'.

If the articles are silent, the notice of Board meeting is not required to specify the nature of business to be transacted thereat [*Compagnie de Mayville v Whitley (1861) 1 Ch. 788*]. If, however, the articles provide otherwise, then the notice must specify the nature of the business to be transacted. All said and done, a better course seems to be that the notice should specify the purpose of the meeting, if it is an extraordinary or special meeting.

Time and Place of Board Meeting : Whether or not the Board meeting can be held on a public holiday and out of business hours is a question open to conflict. As already stated earlier, under Section 288, the ajourned Board meeting is to be held on a day which is not a holiday. But no such restriction has been levied on the matter of holding the original Board meeting. On the basis of the provision of Section 288, one set of argument may be that like the adjourned meeting, the holding of the original Board meeting is equally a normal and usual work of a company and that is why it should be held during usual business hours and on a day which is not a public holiday. On this analogy, a similar inference may be drawn from the provision of Section 166 (2) as well, because it prescribes only for each annual general meeting that it must be held on a day which is not a public holiday and during business hours and also because annual general meeting is normal work of the company. Another set of argument is that a meeting of the Board can take place even on a public holiday and out of business *hours because there is no such restrictions as contemplated either by Section 166 (2)* or by Section 288. We are rather inclined to subscribe to the latter set of argument. This is bacause if the Legislature could think of imposing similar restrictions twice—once at the time of drafting Section 166 (2) in respect of only annual general meeting and the other at the time of drafting Section 288 in respect of adjourned Board meetings—it could rationally think of similar restrictions for the third time in respect of original Board meetings. If the human element of forgetfulness on the part of the draftsmen is to be given any consideration, enen then it can be upheld on the first occasion when Section 166 (2) was drafted. But definitely such forgetfulness is not tenable on the second occasion when Section 288 was enacted especially in respect of adjourned Board meeting. Had it been the intention of the Legislature, it could easily enact a provision and add it as a sub-section to Section 288. It therefore, seems that the Legislature did not deliberately think it necessary to provide for original Board meeting to be held on a day other than a public holiday and during usual business hour. The law

will take its course, howsoever, the course may *sound* irrational. Therefore, in the absence of any specific provisions in the Act, it seems that the original Board meeting can be held even on a holiday and out of business hours.

Quorum : A quorum is the prescribed minimum number of qualified persons authorised to transact the business at a meeting. In relation to a Board meeting quorum implies fully qualified and disinterested director who must be present at the meeting so as to enable the Board of which they are the constituents to legally transact the business thereat. Can such a quorum be fixed by the articles of a company ? No in view of Section 287 which has fixed the quorum for the Board meetings. Accordingly, such a quorum is one-third of the total strength of Board (any fraction contained in the said one-third being round off as one) or two directors, whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, the Quorum=1/3 (of total strength—vacancies). Where total number of directors are 9 and 2 offices of directors have fallen vacant, we find : 1/3 of (9—12)=1/3 of 7=2⅓ directors. If the fraction of 3rd is to be rounded off as one then 3, *i.e.* 2+1 directors would constitute the quorum for the Board meetings. If at any time the number of interested directors exceeds or is equal to two-thirds of the total strength, the number of the remaining directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. For example, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the currency of the meeting, an item comes up for discussion in respect to which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 present at the meeting are to transact the particular item of business.

Now suppose all the 15 directors cited in the above illustration are equally interested in that particular item of business and the item is so vital that but for a decision thereon, the business of the campany will be greatly hampered. How to resolve this *impasse* ?

The Act has not made any direct provision to tackle with such a situation. But Article 48 of table A of Schedule 1 to the Act, provides a remedy. According to the said Article, the Board may, whenever it thinks fit, call an extraordinary general meeting. By invoking this Article, the Board should get the aforesaid *impasse* resolved by the shareholders at the general meeting. Since according to Section 173 (1) (b), all business in the case of any other meeting than the annual general meeting is to be deemed special, by virtue of sub section (2) the notice of the extraordinary meeting must annex to it a statement setting out all the material facts concerning the item of business, including, in particular, the nature of the concern or interest therein of every director.

We have seen that interested directors are excluded from the computation of the quorum under Section 300 (1). However, in terms of Section 300 (2), the

interested directors can be counted for the purposes of quorum in the following cases, namely—(a) where the company is a private company which is neither a subsidiary nor a holding company of a public company ; (b) where the company is a private company which is a subsidiary of a public company, in respect to any contract or arrangement entered into or to be entered into, by the private company with the holding company thereof ; (c) where there is any contract of indemnity against any loss which the directors or any one or more of them may suffer by reason or becoming or being sureties or surety for the company ; (d) in respect of any contract or arrangement entered or to be entered into with a public company, or a private company, which is a subsidiary of a public company in which the director's interest consist solely (i) in his being a director holding shares of such number or value as to be just enough and not more than enough to qualify him for appointment as director, or (ii) in his being a member holding not more than 2% of the paid-up share capital of the company ; (e) where it is a public company or a private company which is a subsidiary of a public company in respect of which the Central Government has, through a notification in the Official Gazette, waived the necessity to comply with the requirements of Section 300 (1) on considerations of establishing or promoting any industry, business or trade in the public interest.

Inability to hold a Board meeting for want of quorum results, as has already been *stated*, in the automatic adjournment thereof under Section 288. It has also been stated earlier that according to Section 191, a resolution passed at an adjourned meeting is deemed as having been passed thereat itself ; it does not date back to an earlier date, *i.e.*, the date of the original meeting. It would be worthwhile to recapitulate here the provisions of Section 174 (2) to (5) which deal with adjournment of general meetings for want of quorum so as to compare them with the provisions relating to adjournment of Board meetings. Unless the article of a company—whether public or private—provide otherwise, if the quorum is not present within half-an-hour from the time fixed for the general meeting, it shall stand dissolved in case the meeting has been convened, under Section 169, on the requisition of members ; in regard to any other class of meeting, it shall stand adjourned to the same day in the next week at the same time and place or to such other day and at such other time and place as the Board may determine. If again at the adjourned meeting the quorum is not present within half-an-hour of the scheduled time then the members present shall constitute the quorum. According to Article 53 of Table A of Schedule I to the Act, where a meeting is adjourned for 30 days or more, a fresh notice of the adjourned meeting has to be served. Thus, Section 288 does not throw any light on what happens if the quorum is not there at the adjourned meeting as well whether the Board meeting is to be adjourned over and over again till the quorum is procured. Secondly, for want of quorum, the Board meeting automatically stands adjourned to the same day in the next week and at the same time and place. But the Board has no power to fix any other day or place or time for such adjourned meeting : whereas in the case of general meeting, the Board can adjourn it to any other day or other time and place. Thirdly, Section 288 implies that a Board meeting can be called on a public holiday, though not the adjourned meeting. Under Section 166 (2) annual general meeting cannot be held on a public holiday. But in the absence of any specific prohibitions by the Act, a statutory and an extraordinary meeting can be held on a public holiday.

The term "public holiday" in this context should be understood. According to the proviso to Section 2 (38) no day declared by the Central Government to be a public holiday shall be deemed to be a public holiday unless the declaration was notified before the issue of the notice of the meeting. Suppose, the notice of a meeting was issued on April 1 whereby it was to be held on May 3. If on April 2, the Central Government declares the third day of May as a public holiday, there is no bar to the holding of the meeting on May 3 in spite of its being declared as a public holiday. If, however, the declaration is notified before the issue of the notice convening the meeting *i.e.*, say on the 31st March, the meeting cannot be held on May 3.

Resolutions : The resolutions of the Board fall into the following three categories :

(a) *Those passed at Board meeting* : These specific resolutions are covered by Section 292 which we have already discussed in the Study Paper relating to directors. Besides those, there are other resolutions which must be passed only at a Board meeting These are : (i) Resolution for filling casual vacancies under Section 262 ; (ii) Resolution for giving consent to contracts with directors as required by Section 297 ; (iii) Resolution for appointing as managing director or manager of a company of a person who is already holding such a post in another company [unanimous consent being necessary under the proviso to Section 316 (2)] ; (iv) Resolution for making investments in companies under the same management group (unanimous sanctioned being necessary under Section 372)

As regards the form of the aforesaid resolutions, it would be sufficient if the substance thereof is entered in the minutes. A formal resolution is not necessary. Board resolutions may be implied from conduct as well [*Freeman* v *Buckhurst* (1964) *2 Comp. L. J 36 (49)*].

(b) *Those passed by circulation* : These are covered by Section 289 which has already been discussed in the Study Paper relating to directors.

(c) *Those signed by all the members of the Board entitled to receive notice of Board meeting under Article 81 of Table A of Schedule I to the Act.* Accordingly a resolution in writing signed by all the members of the Board entitled to receive notice of a Board meeting shall be as valid and effectual as if it had been passed at a meeting of the Board. However, the matters mentioned in Section 292 cannot be dealt with by a resolution under the said Article 81, because of the mandatory character of Section 292.

Chairman of the Board : According to Article 76 of Table A, the Board may elect a chairman of its meeting and determine the period for which he is to hold office. If no such chairman is elected, or if at any meeting the chairman is not present within five minutes from the schedule time for the meeting then the directors present may choose one from amongst them to be chairman of the meeting.

Committees of directors : Subject to the provision of the Act, the Board may delegate any of its powers to the committees consisting of such number or numbers of its body as it think fit. A committee so formed shall, in exercise of the

powers so delegated, conform to any regulations that may be imposed on it by the Board (Article 77 of Table A).

A committee may elect a chairman of its meeting. If no chairman is elected, or if at any meeting the chairman does not turn up within five minutes from the time scheduled for the meeting, the members present may choose one from amongst them to be the chairman of the meeting (Article 78).

A committee may meet and adjourn as it thinks proper. Questions arising at any meeting of a committee shall be determined by a majority of votes of the members present. And in case of an equality of votes the chairman shall have a second or casting vote (Article 79).

All acts done by the Board meeting or by its committee meeting or by any person acting as a director shall be as valid as if every such director or such person had been duly appointed and was qualified to be a director. The validity of all such acts done is not affected even if it is discovered later on that there was some defect in the appointment of any one or more of such directors or of any person acting as a director. The said acts will also remain unaffected even if the directors are later on discovered to be disqualified (Article 80). This provision has been intended to prevent the validity of transactions from being questioned where there has been a slip in the appointment of a director. But the provision cannot be utilized to ignore or override the substantive provisions pertaining to such appointment. It is applicable only to acts of directors whose appointment or qualification is later on discovered to be faulty. Where, however, their appointments have not taken place at all but they merely chose to act on the company's behalf, the protection prescribed by either Article 80 or Section 290 cannot be invoked [*Morris* v. *Kanssen* (1946) *I, A.E.R. 586 (HL)*]. This is because the said subsequent discovery must be a discovery of the defect ; it must not be the discovery of facts which go to constitute the defect [*British Asbestos Co.* v *Boyd (1903) 2 Ch. 439*].

Suppose a regulation like Article 80 is included in the articles of association of a company. What would be the possible impact of this ? The impact has been summed up in Halsbury's Laws of England (vide p. 277 3rd Edition, Vol. VI) thus : "An article validating the acts of persons acting as directors, though it is afterwards discovered that that was a defect in their appointment or qualification, operates not only between the company and outsiders but also as between the company and its members ; as where *defacto* directors make a call, summon meetings of the company, elect other directors or allot shares. A *defacto* director may be ordered to furnish a statement of affairs in winding up. Directors cannot take advantage of any informality in their proceedings in which they have themselves participated ; they are estopped as between themselves and the company ; they are also estopped from saying that they have been improperly appointed, if they have acted after their appointment. Persons dealing with them who know of the invalidity are likewise estopped."

It should also be noted that Section 290 applies to acts of an individual director, whereas Article 80 covers acts of the Board and of its committee.

Minutes of Board meeting: The procedures for writing out the minutes of the Board meetings are the same as these are applicable to general meetings of the company. These are governed by Sections 193-196 which we have already discussed earlier. It may, however, be noted that the decision of the Board need not in all case be formally recorded in writing and their intention may be implied from conduct [*H.L. Bolton (Engineering) Co. Ltd.* v. *T.J. Graham & Sons (1956) 3, All E.R. 624*].

Investigation etc.

Accounts : The tendency of the Legislature in recent years has been to compel companies to make the fullest possible disclosure of their financial affairs in the statements of accounts supplied to the shareholders. It is essential, therefore, that persons responsible for either preparation or for reporting thereon should be familiar with the provisions of the Act relating to their accounts and audit. For a more detailed discussion thereof, a reference should be made to the Study Paper on Auditing and Accounting.

The important matters relating to accounts of companies in regard to which provisions have been made by the Companies Act are (i) the *maintenance* of proper books of account ; (ii) the preparation, at fixed intervals, of the profit and loss accounts and the balance sheet and their audit ; (iii) the information that should be disclosed in the final accounts published by companies and the report thereon by directors ; (iv) the right of members to be furnished with copies of accounts and of directors', and auditors' reports ; (v) the appointment and qualifications of auditors.

Restrictions on appointment of staff: Sections governing this matter are 204, 294, 314 and Schedule VII to the Act. By Section 204, no firm or body corporate, after the commencement of the Act *shall* be appointed to, or employed in, any office or place of profit under a company other than that of trustee for the debentureholders of the company for a term exceeding five years at a time, though the initial appointment may be made for a term not more than ten years with the approval of the Central Government. There is an exemption, however, in the case of technicians and consultants referred to in sub-section (2). The other sections referred to above have been discussed in the later Study Paper.

Document to be filed with Registrar : [Section 220, as amended by the Companies (Amendment) Act 1977 which came into force from 24-12-76] : In the case of a public company, there shall be filed within 30 days from the date on which the balance sheet and the profit and loss account were laid before the company's annual meeting or where the annual general meeting for any year has not been held, there shall be filed within 30 days from the latest day on or before which that meeting should have been held in accordance with the provisions of this Act, with the Registrar, three copies thereof (the practice is to file six copies since Department requires extra copies) signed by the managing director, manager or secretary of the

company or if there be none of these, by a director of the company, together with three copies of all documents required by the Act to be attached or annexed to the balance sheet or profit and loss account. But in the case of a private company, copies of the balance sheet and profit and loss account have to be filed separately. Formerly, private companies were not required to file profit and loss account. Now, they have to file it but separately from the balance sheet. This is because in the case of most private companies, non-members cannot inspect the profit and loss account. The second proviso to Section 220 (1) (a) provides that in case of a private company which is not subsidiary of a public company or (ii) private company of which the entire paid-up capital is held by one or more foreign companies or (iii) a company under Section 43A (if Central Government direct that inspection should not be allowed to non-members) non-members cannot inspect, or obtain copies of the profit and loss account.

If, for some reasons, the annual general meeting of company fails to adopt the balance sheet, or if the annual general meeting of a company for any year has not been held, then a statement to the effect and of the reasons therefor must also be annexed to the balance sheet and copies thereof filed with the Registrar.

Registrar's powers to call for information and submit a report to the Central Government (Section 234) : If, on a perusal of any document required to be filed with the Registrar under the Act, he is of the opinion that some information or an explanation is necessary with respect to any matter to which such document purports to relate, he may call in writing for such information or explanation to be supplied to him within such time as he may specify in the order from the company. Thereupon, any person who is or has been an officer of the company, should furnish such information or explanation to the best of his ability. It would be the duty of the company and such person to furnish the information and explanation to him. If no information or explanation is furnished within the time specified or if the information or explanation furnished is in the opinion of the Registrar inadequate, he may by another written order call on the company to produce within the time specified, for his inspection such books and papers as he considers necessary. Any failure to supply the information or to produce the books would render the company and the person as aforementioned punishable with fine which may extend up to Rs. 500 and in addition to a fine up to Rs. 50 per day in the case of continuing offence.

The court may, on the application made by the Registrar, make order for production of books, etc. for the purpose of this Section.

If such information or explanation is not furnished within the specified time or after the perusal of such information or explanation or of books, etc., the Registrar is of the opinion that the document in respect of which he had called for the information together with explanation, books, etc., does not disclose a full and fair statement of the matter to which it purports to relate etc., or disclose unsatisfactory state of affairs, he shall report in writing about the circumstances of the case to the Central Government. On receipt of any written information or explanation as well as of any book or paper, called for by the Registrar, he may annext that to the document which is required to be submitted to him under this Act.

If some material is placed before the Registrar by contributory or creditor of the person intersted alleging that the business of the company is being carried on in fraud of its creditors or of persons dealing with the company or otherwise for a fraudulent or unlawful purpose for the purpose of inquiring into such charges the Registrar also has been invested with the power after giving the company an opportunity of being heard, to call in writing for any information and explanation in the foregoing manner either from the company or from a person who is or has been an officer of the company.

Section 234A provides for the seizure of documents by the Registrar. Accordingly, if, upon an information at his head or otherwise, the Registrar reasonably believes that books and papers of, or relating to, any company or other body corporate, managing director or manager of such company or other body *corporate*, are likely to be destroyed, mutilated falsified or secreted, the Registrar may make an application to the Central Government or to a First Class Magistrate or a Presidency Magistrate, as the case may be having jurisdiction, for an order for the seizure of such books and papers. Thereupon, if the Central Gnvernment or the Magistrate, as the case may be, is convinced of the necessity for such a seizure, it or he may authorise Registrar to enter the places where the relevant books and papers are kept to search in the manner specified as well as to seize them. The Registrar must return the books and papers to those from whom these are seized, at an early date but not later than the 30th day after such seizure ; also he must inform the Central Government or the Magistrate of such return The Registrar may take out copies of extracts from them or place identification marks on them or any part thereof.

Investigation affairs of company on application by members or a report by the Registrar as well as other cases (Section 235) : The Central Government may appoint inspectors for investigation into the affairs of any company and reporting thereon the following circumstances (a) in the case of a company having a share capital, on the application either of not less than 200 members or of members holding not less than 1/10th of the total voting power therein ; (b) in the case of a company not having a share capital, on the application of not less than 1/5th in number of the persons on the company's register of the members. The application under (a) or (b) above must satisfy the requirement of Rule 8 of the Companies (Central Govt's) Rules and Forms ; (c) in the case of any company, on a report by the registrar that a document filed with him by a company discloses an unsatisfactory state of affairs, or it does not disclose full and fair statement or the matter to which it purports to relate.

An application as aforementioned under (a) or (b) must be supported by such evidence as the Central Government may require to show that the applicants have good reason for requiring the investigation. In addition, the Government may require the applicants to furnish a security of an amount not exceeding Rs. 1,000 for the payment of cost of the investigation (Section 236).

It may be noted that under Section 237 : (a) the Central Government shall initiate investigation, if the company by a special resolution or the Court by an order declares that the affairs of the company ought to be investigated ; and (b) may do so

when in the opinion of the Government there are circumstances suggesting (i) that business of the company is being conducted with a view to defraud its creditors, member or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members ; (ii) that the persons concerned with the formation or management of the company are guilty of fraud, misfeasance or misconduct ; (iii) that members of the company have not been given all the information with respect to its affairs which they might reasonably expect.

It, may, however, be noted that the discretionary power, referred to in (b) above is not violative of Article 14 of the Constitution of India relating to the fundamental rights of a company to property and equality. But, the statute having permitted the delegation of powers to the Board only as the statutory authority, the power so delegated have to be exercised by the Board as a whole and not by its constituents. Thus, if an order of investigation is made only by the chairman of the Company Law Board himself, whereas under the law it should be made by the Board acting as a whole, such an order would be bad [*Barrium Chemicals Ltd.* v. *The Union of India (1966) (S.C.) 36 Comp. Cas. 639.*

Powers of inspectors to carry on investigation (Sections 239 and 240) : An inspector under the Act has been given wide powers as to the manner in which he can carry on an investigation If he thinks it necessary to investigate even the affairs of another company in the same management or group, he is empowered to do so. However, in certain cases specified in Section 239 (2), he has to obtain prior approval of the Central Government for this purpose (Section 239).

It is the duty of all officers and other employees and agents of the Company to preserve all books and papers of and relating to the company. The inspectors may compel the aforementioned persons, with the previous approval of the Central Government, to produce before them the said books and papers as well as to render all reasonable assistance in connection with the investigation [Section 240 (1)].

With the prior approval of the Central Government, they can require any body corporate [other than body corporate referred to in sub-section (1)] to furnish such information, or produce such books and papers to them or any person authorised by them [Section 240 (1A)].

The inspectors can keep in their custody the books and papers so received either in original or certified copies for six months. But thereafter they must return to them from whom those are received. But after the return of the documents, these might be called back, if they are needed again [Section 240 (1B)].

An inspector may examine on oath any of the persons referred to in Section 240(1) and with the previous approval of the Central Government in that respect may examine on oath any other person. The examination must relate to the affairs of the company, other body corporate. Any of these persons may be compelled by the inspector to appear before him personally. Persons who fail to co-operate with the inspector are punishable with imprisonment for a term, extending to six months or with a fine extending to Rs. 2,000 or with both and also with a further fine which may extend to Rs. 200 for every day after the first during which the failure or

refusal continues. Notes of the aforesaid examination are required to be taken in writing and have to be read over to or by and signed by the person examined.

Section 240A empowers an investigator to have the books or papers seized by moving the Court or Magistrate by an application, where he apprehends that these may be altered, falsified or secreted. He may keep such documents in his custody for a period not beyond the date of conclusion of the investigation. But before returning them he may place identification marks on them or any part thereof.

Inspectors Report (Section 241) : The inspectors may and, if directed by Central Government, shall make an interim report to the Government and shall make a final report at the conclusion. The Government shall forward a copy of any report other than an interim report to (a) the company ; (b) any body corporate, or associate dealt with in the report by virtue of Section 289 ; (c) the persons who applied for the investigation at their request ; (d) the Court, where the inspector is appointed by its order. Copies may also be supplied to members or creditors of the company, other body corporate, or associate within Section 239 (in the case of creditors their interest must appear to the Central Government to be affected).

Powers of the Central Government : If from the report of the inspectors, it appears to the Central Government that any person has, in relation to either the company or any other body corporate, whose affairs have been investigated under Section 239, been guilty of a criminal offence, it may after giving such legal notice as it thinks fit under Section 242, institute a prosecution against any such person as it thinks fit.

The Government also has powers under Section 243 and 244 to start proceeding (i) for the winding up of the company or body corporate, etc., referred to in Sections 239 by making a petition for winding up on the ground that it is just and equitable that it should be wound up ; (ii) for relief in case of oppression and mismanagement of a company under Section 397 or 398 by making application under these Sections ; (iii) by making both petition and application in the above cases ; (iv) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation or the management of affairs of such company or body corporate, etc., referred to in Section 239 ; (v) for the recovery of any property of such company, body corporate, etc., which has been misapplied or wrongfully retained. Proceedings (iv) and (v) should be in the name of the company and it must appear to Central Government that such proceeding should be brought by the company in public interest.

The expenses of investigation shall be borne by the Government in the first instance but may be recovered either from persons who are convicted on prosecution under Section 242 or who are ordered to pay damages in proceedings under Section 244 to the extent specified by the order of the Court convicting them. The company in whose name the proceedings are brought is also bound to reimburse the Govt. to the extent of the amount or value of any sums or property recovered—

(a) If, however, prosecution has been instituted under Section 242 the company, the managing director or manager dealt with by the report of the inspector shall be liable to imburse the Government in respect of the whole of the expenses unless the Central Government otherwise directs.

(b) Where an inspector was appointed under clause (a) or (b) of Section 235 on the application of members, those applicants shall be liable to bear the cost to such extent as the Central Government may direct.

The amounts of expenses reimbursable to the Central Government, as referred to in para (a) above, are recoverable as arrears of land revenue. If moneys spent by the Central Government cannot be recovered, they shall be paid out of money provided by Parliament. "Expenses" include expenses of proceedings under Section 244 [Section 245].

Distinction between inspection and investigation : Inspection signifies the right to inspect certain books, papers and documents, conferred by the Act upon certain individuals, *e.g.*, the right of inspection of books of account and other books and papers during office hours by directors, Registrar and any officer of the Government authorised by the Central Government (Section 209), the right of inspection of register and returns by any members or debentureholders without fee and by any other person on payment of a fee of one rupee for each inspection (Section 163); the right of inspection of minute books by a member (Section 196); that under Section 304, etc. On the other hand investigation signifies probing into the affairs of a company. Sections 235 to 251 deal with investigation, which we have already discussed above.

Summary of Rights, powers and duties of the Inspector are outlined below :

Power to investigate, if thought necessary, even the affairs of another company in the same management or group as the one for whose investigation he has been specifically appointed [Section 239 (1)]. *Duty* or obligation to obtain the prior approval of the Central Government for the purpose in certain cases specified in Section 239 (2).

Right to compel all officers, employees and agents of the company, whose duty it is to preserve all books and papers of, and relating to, the company under investigation, to produce before him the said books and papers as well as to render all reasonable assistance in connection with the investigation. Duty to obtain the previous approval of the Central Government for compelling such production [Section 240 (1)].

Power under Section 240 (1A), to require any body corporate [other than the body corporate mentioned in Section 240 (1)] to furnish such information or produce such books and papers to him or any person authorised by him. *Duty* to seek the previous approval of the Central Government before exercising this power.

Right under Section 240 (1B), to keep in his custody the books and papers so received either in original or certified copies for 6 months. *Duty* to return them, after the expiry of this period, to the company, body corporate, firm or individual by whom or on whose behalf they were produced. *Power*, despite this return, to call for such books and papers if they are needed again,

Section 240 confers upon the inspector the *Power* to require any of the persons mentioned in sub-section (1) thereof to appear personally before him and to examine him on oath in relation to the affairs of the company and other body corporate; also *Power* to examine on oath any other person than those mentioned in sub-section (1)———in this context, it is the inspector's *duty* to have the previous approval of the Central Government and to have the aforesaid examination in writing, to have the examination report read over to, and signed by, the person examined.

Powers, under Section 240A, to have the books or papers seized, where he apprehends that these may be altered, falsified or secreted. *Right*, to keep, such documents for a period not beyond the date of the conclusion of the investigation; but before returning them, he may place identification marks on them or any part thereof. *Duty* to move the Court of the Magistrate by an application for the purpose of the said seizure.

Duty, on the conclusion of the investigation, to submit a report to the Central Government. The inspector has also the *right* to make an interim report to the Central Government, but this right is converted into his *duty* if he is directed by the Central Government to submit an interim report [Section 241].

Courses open to the Central Government on receipt of the inspector's report :

(i) Under Section 242, if the inspector's report submitted to the Central Government reveals that any person has been guilty of a criminal offence in relation to the company, then the latter may, on taking appropriate legal advice, prosecute such person for the offence. It can compel all officers, other employees and agents of the company to give it all possible assistance in the matter of prosecution.

(ii) According to Section 243, if, from the inspector's report, the Central Government feels that it is expedient to wind up the company by reason of the circumstances mentioned in Section 237 (b) (i) or (ii), it may, unless the company is already being wound up by the Court, cause to be presented to the Court by any person duly authorised in that regard a petition for winding up of the company on the ground that it is just and equitable that it should be wound up, or an application for an order under Section 397 or 398 (pertaining to relief against oppression and mismanagement), or both a petition and application.

(iii) From the said report, it may appear to the Central Government that the company whose affairs have been investigated ought to institute proceedings, in the public interest, for recovery of damages from any person guilty of fraud, misconduct or misfeasance in connection with the promotion or formation, or the management of the company, or for recovery of any property of the company, which has been misapplied or

wrongfully retained. In such circumstances, the Central Government may itself bring, in terms of Section 244, such proceedings in the name of the company.

(iv) It is true that the Central Government has to bear the expenses of investigation in the first instance. But Section 245 empowers it, under certain circumstances, to recover the same from any person who has been guilty of fraud, misconduct, misfeasance or wrongful retention of the company's property, or from the persons at whose behest the investigation was ordered and undertaken.

(v) On the receipt of the inspector's final report, the Central Government has to forward a copy thereof to the company concerned. If it thinks fit, it may furnish a copy, on payment, to any member of the company or to any creditor of the company. A copy should also be forwarded by the Central Government to the Court or to the members of the company if investigation was commenced at their instance. If the Central Government wants, it can also publish the report (Section 241).

Information regarding persons having an interest in a company : Whenever it appears to the Government that there is good reason to investigate the ownership of any shares in or debentures of a company, and it is considered unnecessary to appoint an inspector, the Government may call upon any person whom it was reasonable cause to believe (a) to be or have been interested in the shares and debentures of the company, (b) to act or to have acted as a legal adviser or an agent of some one interested in the shares of debentures or furnish information as to present and past interest in those shares, etc., names and addresses of person interested, etc. [Sections 248(1)].

It is obligatory on the person to furnish the information which they have or can be reasonably expected to obtain. If they fail to do so, they are punishable with imprisonment for a maximum period of 6 months or with a fine up to Rs. 5,000 or with both [Section 248(4)].

Imposition of restriction on shares or debentures (Section 250) : Where it appears to the Central Government that the relevant facts about shares or debentures cannot be found unless restrictions are imposed on them, it may impose the following restrictions *viz.*, any transfer of those shares shall be void : (b) where those shares are to be issued they shall not be issued ; and any issue thereof or any transfer of the right to be issued therewith, shall be void ; (c) no voting right shall be exerciseable in respect of these shares ; (d) no further shares be issued in right of those shares or in pursuance of any offer made to the holder thereof ; and any issue of such shares or any transfer of the right to be issued therewith, shall be void ; and

(e) except in a liquidation, no payment shall be made of any sums due from the company on those shares, whether in respect of dividend, capital or otherwise.

An aggrieved person has been given the right to apply to the Court to have the order quashed. No order, interim or final, shall be passed by the Court without giving the Central Government an apportunity of being heard.

So long as the order has not been quashed either by the Central Government or the Court, if a person exercises any rights in regard to the shares in contravention of the order aforementioned, he would incur heavy penalties prescribed by Section 50. Prosecution cannot be instituted without the sanction of the Central Government.

Where a transfer of shares in a company (a) has taken place or (b) is likely to take place and as a result thereof a change in the composition of the Board is likely to take place and the Central Government is of the opinion that such change would be prejudicial to public interest, the Government may direct that in case of (a) : (i) voting rights in respect of these shares shall not be exerciseable for period not exceeding 3 years specified in the order ; (ii) resolution passed to effect change in Board shall not have effect unless confirmed by the Central Government. In the case of (b), the transfer of shares during such period not exceeding 3 years as is specified in order shall be void. Note that (a) (ii) is similar to the remedy provided under Section 409 with the following differences (i) Change under (a) (ii) should be prejudicial to public interest—whereas change under Section 409 should be prejudicial to affairs of company ; (iii) the Central Government must make enquiry before passing order under Section 409. No such enquiry is necessary under (a) (ii) ; an order under Section 409 can override memorandum, articles, etc., while an order under (a) (ii) cannot do so. The Central Government is also empowered to vary or rescind in its orders which shall be served on the company within 14 days of making of the same.

17. **Voluntary winding up of company, etc., not to stop investigation proceeding** (Section 250A) : An investigation may be initiated under Sections 235, 237, 239, 247, 248 or 249 in spite of the fact that an application has been made for an order under Section 397 or 398, or the company has passed a special resolution for voluntary winding up. An investigation so initiated shall not be stopped or suspended on this account.

The provision is intended to prevent dilatory tactics being adopted by the management.

SELF-EXAMINATION QUESTIONS

(The answers are not required to be written out ; answers are given at the end)

1. Is a private limited company required to hold a 'statutory meeting ?"

2. X Co. Ltd. is entitled to commence business from June 1, 1978, (a) State which is the earliest date—June 7, June 14, June, 30, July 1 July 7—on which

the company is required to convene the statutory meeting, (b) Also state the latest date for convening such a meeting.

3. If the statutory report is forwarded later than what is required can it still be deemed to have been duly forwarded ?

4. Who can certify the statutory report as correct ?

5. What is the remedy for a member in the case of a failure either in holding the statutory meeting or in filing the statutory report for registration.

6. A & Co. Ltd. was incorporated on 1-4-79. When is its first annual general meeting to be held ?

7. Can the registrar extend for any special reason the time for holding the first annual general meeting ?

8. Is it necessary for a company to hold its second annual general meeting in the year of its incorporation or the following year ?

9. Suppose a notice was issued on June 1, calling an annual general meeting of a company, to be held on June 23. An important foreign statesman died on June 22, and the Central Government declared the 23rd day of June as a public holiday in honour of the deceased statesman. Could the company hold its annual general meeting on the notified date ?

10. Will the company be exonerated from its liability in the following circumstances ?

(a) The company failed to convene the annual general meeting as its annual accounts were not ready for being laid before the meeting.

(b) The directors were unable to hold the annual general meeting as the account books of the company were seized by the police.

11. Section 220 indicated that the balance sheet and the profit and loss account required to be filed with the Registrar must be such as have been laid before the annual general meeting. The company could not submit them to the Registrar within the stipulated time, as the annual general meeting could not be held. Would the company and its directors be liable to pay penalty for their failure to file the statement of accounts with the Registrar ?

12. Suppose, during the intervening period between the last annual general meeting and the next, some important matters crop up and they need shareholders' consideration. What should the directors do in the circumstances ?

13. Can the members of the company too requisition such a meeting as aforesaid ?

14. Is a business that is transacted at extraordinary general meeting "general" ?

15. Can a general meeting—whether "extraordinary" or "annual"—be called by a notice shorter than that prescribed by the Companies Act ?

16. For certain purposes, the Companies Act requires a special notice, (a) Who should receive the notice and from whom ? (b) Special notice for how many days ? (c) How many days before the meeting should the shareholders get the notice ?

17. What business are deemed to be special at an extraordinary general meeting ?

18. Insofar as a meeting is concerned, what is the importance of the distinction between "ordinary business" and "special business".

19. If the explanatory statement does not give the nature of the special business or gives insufficient particular as regards special business, (a) can the business be transacted at the meeting ? (b) if in the above-mentioned circumstances, a resolution is passed by a majority, will the resolution be infructuous ?

20. What is the quorum for a general meeting : (a) where the company is public limited company ; (b) where the company is a private limited company ; and (c) where the company is a "deemed public" company under Section 43A ?

21. What is the quorum for the meeting of a special class of shareholders : (a) in the case of a public company ; and (b) in the case of a private company ?

22. Even if the quorum is not present at the adjourned meeting within an hour of its scheduled time, will the members present constitute the quorum ?

23. What is the quorum for a meeting of the Board of Directors ?

24. In the absence of a quorum does the Board meeting too get adjourned ?

25. A company's articles require that a proxy should be fixed within 72 hours before the time fixed for the starting of the meeting. A proxy was received by it 60 hours before the meeting was due to start, which the chairman of the meeting refused to consider. Can the person holding proxy compel the chairman to admit it ?

26. X & Co. Ltd. is a member of Y & Co. Ltd. Can the Board of Directors of X & Co. Ltd. authorise any person by a resolution to represent it at the meeting of Y and Co. Ltd.?

27. Where the President of India or the Governor of a State is a member of a company, can he be represented by their appointee at the meeting of the company ?

28. (a) Can the books of account be inspected by any director during the office hours ? (b) Can he take copies of these documents ?

29. Can the Registrar of any authorised Central Government office inspect the books of account and take copies thereof ?

30. The books of account relating to any period must be preserved for (a) 4 years, (b) 6 years, (c) 8 years, (d) 10 years. State which is correct.

31. Are the vouchers relevant to any entry in such books of account also to be preserved for the prescribed period ?

32. Can the Directors, before approving and signing themselves the statements of account, compel the auditors to report on them ?

33. Who must sign the statements of account ?

34. (a) Is a private company required to file profit and loss account with the Registrar? (b) Can it be inspected or copies thereof obtained by a non-member ?

Answers :

1. No : 2. (a) July 1 ; (b) December 31 ; 3. Yes, provided all the members entitled to attend and vote at the meeting consent to it ; 4. At least 2 directors—one of whom being a managing director if any ; 5. Petition to the Court for winding up ; 6. Within 18 months from 1-4-79 ; 7. No ; 8. No ; 9. Yes ; 10 (a) No ; 10 (b) Yes ; 11. Yes ; 12 Call an "extraordinary general meeting" ; 13. Yes ; 14. No ; 15. Yes ; 16 (a). Company from an intending shareholder ; 16 (b) 14 days ; (16) (c) 7 days ; 17. All businesses; 18. Explanatory statement needs be annexed (in respect of every special item) to the notice calling the meeting ; 19 (a) No ; 19 (b) Yes ; 20 (a) 5 members present in person ; 20 (b) 2 members ; 20 (c) 2 members ; 21 (a) 5 of that class present in person or by proxy ; 21 (b) 2 members ; 22. Yes ; 23. 1/3rd of the total strength (any fraction being rounded off as one) or 2 directors whichever higher ; 24. Yes, if the articles do not provide otherwise ; 25 Yes. 26. Yes ; 27. Yes ; 28 (a) Yes ; 28 (b), No ; 29. Yes ; 30. (c) ; 31. Yes ; 32, Yes ; 33. 2 directors and manager or secretary ; 34. (a) Yes ; 34 (b). No.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL

F.S.P. (N)
Adv. C.L.—2

FINAL COURSE (N)
ADVANCED COMPANY LAW
STUDY—II

Contents :

Directors
Legal Position of Directors
Appointment of Directors
Share Qualification for Directors
Managing Director
Removal of Directors (Section 284)
Directors to Act As a Board
Powers of Directors and Restrictions thereon
Loans to Directors, Etc.
Register of Contracts, Companies and Firms in which Directors are Interested
Managerial Remuneration
Liability of Directors
Duties of Directors
Removal of Managerial Personnel
Sole Selling Agents

Prescribed Readings :

"Lecturers on Company Law" by S M. Shah, 18th Edition.
"Principles of Company Law" by M.C. Shukla and S.S. Gulshan, 1977 Edition.
"Indian Company Law" by Avtar Singh, Latest Edition.

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Directors

When a company is incorporated under the Companies Act, 1956, it becomes a legal entity (*i.e.*, a legal person) capable of exercising all its functions. This impersonal creation of law can only act through some agency, and it must be a human agency. It being impracticable for all the members of a company (whose number may be very large in a big public company) to conduct its affairs they elect their representatives for this purpose. These elected representatives are usually known as directors. Under Section 2, a director "includes any person occupying the position of director by whatever name called." Directors of a company collectively are referred to as "the Board of Directors" or the "Board". Any person, in accordance with whose directions or instructions the Board of Directors of a company is accustomed to act, is also deemed to be a director of the company (Sections 303 and 397).

Legal position of directors: (i) *As trustees*: Although a director is described as a trustee, yet he is not a trustee in the true sense of the term; he is so only in a limited sense, *viz.*, that he stands in a fiduciary relationship with his company. It has been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if this statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement" [*As per Romer J. in re City Equitable Insurance Co.*, (*1925*), *1 Ch. 407*]. Since he is in a fiduciary relationship with the company, he is, to that extent, also a trustee of the company's assets which are under the directors' control or which have come into their hands (*Iyyappan* v. *The Dharmodayam Company, 1963 I.S.C.R. 85*]. He is a trustee in the sense that he must act in the interests of the company and not in his own interest. [*Regal* v. *Gukiver* (*1942*), *1 All E.R. 378*]. Because of his fiduciary relationship, he must exercise the powers according to the best of this judgement for the good of the company and its shareholders. It is his duty to abide by the provisions of the articles and to exercise his powers after due deliberation and careful consideration of what he is intending to do. His transactions must be fair and proper [*Narayandas Sowani* v. *Sangli Bank Ltd.* (*1965*) *35 Comp. Cas 596 S.C.*)]. Though the directors are trustees, even in the limited sense, for the company and the shareholder, they are not trustees for the creditors or for individual shareholders or for outsiders.

(ii) *As agents.* Although directors are not agents in the legal sense, the law of agency governs the relationship between the company and its directors. Wherever an agent acting on behalf of his principal will be liable, the directors would also be liable in the like circumstances; where the liability would attach to the principal and the principal only, the liability is the liability of the company. Thus when directors act properly on behalf of the company, they do not incur personal liability. If they exceed their powers, but the acts are *intra vires* the company, is can ratify the acts. They are not in the position of agents to share-

holders. In certain respects, their powers are more extensive than those of agents because the shareholders who appoint them do not have much opportunity to control their acts.

(iii) *As managing partners*: The directors who look after a company do so or themselves as well as for the shareholders. Their position is similar to that of managing partners, for they are appointed to their offices by an arrangement between them and other members. But they do not have all the powers or liabilities of managing partners. Even amongst the directors themselves there is no mutual agency as in the case of partners.

"Directors" are described as trustees, agents or managing partners, not as exhausting their powers or responsibilities but as indicating useful points of view. It does not matter much what you call them, so long as you understand what their true position is, that "they are commercial men managing a trading concern for the benefit of themselves and all other shareholders in it" (*as per Lessel M.R. in re-Forest of Dena Coal Mining Co. 10 Ch. D-450*). The best way to describe their position is to say that they stand in a fiduciary position towards the company in regard to powers conferred on them by the articles (*Re City Equitable Fire Insurance Co.*

Number of Directors: The articles generally specify the maximum number of directors that a company may have Every public company (other than a public company which has become such by virtue of Section 43-A) must have at least three directors. Every other company must have at least two direcsors (Section 252).

Appointment of Directors. You will appreciate that the competence and integrity of directors of a company go a long way in bringing about its success, The company, therefore, must be pretty choosy in selecting the proper persons to vest them with its management. That is why the Act stricts in regulating the appointment of directors. Accordingly, only an individual can be a director of a company. Consequently a body corporate firm or other association of persons cannot be appointed as director (Section 253), Usually, the articles of a company name the first directors, but their appointment will be valid only if the conditions prescibed by Section 266 (1) of the Act have been complied with namely—(i) that the director has given his consent in writing and the same has been filed with the Registrar: and (ii) that he has subscribed to the memorandum undertaking to purchase the qualification shares or has acquired the number of shares prescribed as the qualification for a director or has filed an affidavit with the Registrar to the effect that he shall take or pay for his qualification shares or that shares of the value, not less than qualification shares, are registered in his name. These restrictions, however, do not apply to the case of a private company.

Section 254 provides that "in default of and subject to any provisions in the articles" subscribers to the memorandum who are individuals shall be deemed by the directors of the company till directors are appointed by the company under

Section 255. Generally, however, the articles name the first directors. Sometime, (as Regulation 64 of Table A lays down) articles may also provide that both the number and the names of the first directors have to be determined in the writing by subscribers to the memorandum or a majority of them. In such a case it has been held that a majority of subscribers should be present (and not the quorum as required by the articles) before the first directors could be validly appointed [*Re London and Southern Company Countries, etc. (1885) 31 Ch. D. 223*].

According to Section 255, at least 2/3rds of the total number of directors of the public limited company in question must, in the first place, be appointed, save as otherwise expressly provided in the Act by the company in *general meeting* secondly, they must be persons whose period of office is liable to be determined by retirement of directors by rotation. The remaining directors of such company must also be appointed in the same way unless some other provision for such appointments is made in the articles of the company concerned as where, for instance, the articles authorise a financial institution which may have adanced large loans to the company to indirect a director on the Board of the company.

Now, the general meeting underlined above may be either an annual general meeting or an extraordinary general meeting. But in practice, appointments of directors pursuant to Section 255 are made, at the first annual general meeting after the incorporation of the company. Persons who are named as directors in the articles of the public company have to retire from office at such meeting unless any of them (not exceeding 1/3rd of the total number of directors constituting the Board for the time being) had been appointed under an authority conferred upon some person by the articles as aforesaid and the shareholder appoint directors of their own choice.

The provision as regards the retirement of directors by rotation are designed, in the words of Justice Sarkar, "to eradicate the mischief caused by self-perpetuating managements" [*Oriental Metal Pressing Works* v. *Bhaskar A.I.R. 1961 S.C. 573 at p. 575*]. According to Section 256, out of the 2/3rds rotational directors only 1/3rd must retire by rotation at one general meeting. If their number is not three or multiple of three then the number nearest to 1/3rd must retire from office. First those directors who are the longest in office must retire. If two directors have been appointed on the same day, their retirement will be determined either mutually or by lot. The vacancies caused by such retirement may be filled in the same annual general meeting by appointing either the retiring directors or some other person. But the meeting may also decide that the vacancies should not be filled. Where, however, the meeting has not done either of the two, then the meeting is deemed to have been adjourned for a week. If at the adjourned meeting held after the side week, fresh appointment is not made and if no resolution against appointment is passed, then the retiring directors shall be deemed to have been re-appointed except in the following cases; (a) where at the meeting or at the previous meeting the resolutions for the re-appointment of a particular director was put to vote but lost; (b) where the retiring director has expressed his unwillingness to be re-appointed by a written notice addressed to the company or its Board of Directors; (c) where he is unqualified or has been disqualified for

appointment ; and (b) where any special or ordinary resolution is required for his appointment or re-appointment.

You should also remember that a director who is to retire by rotation at an annual general meeting cannot continue in office after the last day on which the meeting ought to have been called as required by Section 166. [*R.H.C. Insurance Society Ltd.* (*1960*) *65 C.W.N. 86* ; *Krishna Prasad Pilani* v. *Calaba Land Mills* (*1960*) *Bom. 312*]. It should further be noted that the provision of Sections 225, 256 do not apply to company whose articles provide for the election of directors by ballot provided the company does not carry on business for profit or prohibits the payment of a dividend to its members (Section 263A).

Directors, ordinarily, are to be appointed on a single transferable vote of the members of the company. But the articles of a public company or a private company which is subsidiary of a public company may adopt the principle of proportional representation for appointing not less than 2/3rds of the total number of the directors, whether by a single transferable vote or by a system of cumulative voting or otherwise. In such a case, appointments will be so made once in every three years and interim casual vacancies will be filled in conformity with the provisions of Section 262 (S. 265), Cumulative voting denotes that if there are five candidates, each voter will have five votes. He can cast all the five votes in favour of one candidate or distribute his five votes among different candidates. This system of voting ensures that the Board will have fair representation of the minority interest.

A public company may be by an ordinary resolution, increase or reduce the number of its directors within the limits fixed by the articles but any increase in the number of its directors beyond the maximum permissible under the articles must t e by a special resolution and have the approval of the Central Government (Sections 258 and 259). Where, however, such 'permissible maximum' is 12 or less, approval of the Central Government is required if the increase does not make the total number of directors more than 15 (Proviso to Secton 259). In other words, the approval of the Government would not be required for increase in the number of directors up to 12 irrespective of the provisions in the articles of association.

When empowered by the articles, the Board of Directors can appoint additional directors. But such additional directors shall hold office only up to the date of the next annual general meeting. Also the total number of additional directors and other directors together must not exceed the maximum strength fixed for the Board by the articles (Secton 260).

Where the office of a director appointed by the public company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles, be filled by the Board at its meeting but not by a resolution passed by circulation. However, the person appointed in the casual vacancy shall hold office only up to

the date to which the director in whose place he is appointed would have held office (Sec. 262).

Appointment of directors by Central Government: Section 408 as amended *from February, 1975) empowers the Central Government to appoint such number of persons as the Central Government may, by order in writing, specify as being necessary to effectively safeguard the interest of the company, or is shareholders or* the public interest, for a maximum period of 3 years at a stretch, with a view to preventing the oppression of the members or mismanagement of the affairs of the company provided the conditions prescribed by the Section are fulfilled.

N B. For a detailed discussion of Section 408, refer to F.S.P. (N) C.L. 3.

Appointment of alternate directors: The Board of Directors of a company may, if authorised by its articles or by a resolution passed by the company in general meeting, appoint an alternate director to act for a director during his absence (for period of not less than 3 months) from the State in which meetings of the Board are ordinarily held. Such a director only officiates for the permanent incumbent and cannot hold office for a period longer than that permissible for the original director and as such vacates the office on the return of the original director. Also, if the term of office of the original director is determined before the returns, any provision for the automatic re appointment of retiring director in default of another appointment shall apply to the original director and not to the alternate director (Sec. 313).

Who cannot be appointed directors: The Companies Act prohibits, undischarged insolvent and frandulent persons from discharging any of the functions of a director. Under Section 202 if an undischarging insolvent discharges any of the functions of a director, he is punishable with imprisonment (extending to 2 years) or fine (extending to Rs. 5,000) or with both. 'Company in this context includes an unregistered company as well as a foreign company having an established place of business in India). Similarly, Section .03 provides that: (a) where a person is convicted of an offence in connection with the promotion, formation or management of a company; or (b) where in the course of winding up of a company, it appears that (i) a person has been guilty of an offence under Section 542 (whether convicted or not), or (ii) has been otherwise guilty while an "officer" of the company of any fraud, misfeasance or breach of duty in relation to the company, the Court may order that such person shall not without the leave of the Court be a director of a company for a period not exceeding 5 years. (The Court as regards (a) includes the convicting Court and as regards (b) the Court having jurisdiction to wind up the company).

Furthermore, under Section 274 a person cannot be appointed as director of a company in any of the following cases, namely:

(i) where he has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force;

(ii) where he is an undischarged insolvent;

(iii) where he has applied to be adjudicated as an insolvent and his application is pending;

(iv) where he has been convicted by a court of an offence involving moral trupitude and sentenced to an imprisonment for not less than six months and a period of five years has not elapsed from the date of the expiry of the sentence;

(v) where he has failed to pay any call in respect of shares held by him, where singly or jointly with others and six months have passed since the last day fixed for the payment of the call;

(vi) where he has been convicted of an offence in relation to promotion, formation or management of the company, or where he has been found, during the course of winding up to be guilty of fraudulent conduct of business or misfeasance in relation to the company and as a consequence the Court has disqualified him for being appointed as a director for a period not exceeding 5 years.

[It may be noted that the particular disqualification may be removed by the Court Section 274): the disqualification mentioned in (iv) and (v) may be removed by the Central Government by notification in the Official Gazette].

A private company which is not a subsidiary of a public company can provide for additional grounds for disqualification. But a public company or its private subsidiary cannot provide for additional grounds for disqualification.

A person cannot hold office at the same time as director in more than *twenty* companies excluding a private [company which is not subsidiary or holding company of a public company; an unlimited company an association not for profit and a company in which such person is only an alternative director (Section 275 and 278). In this context let us now consider an illustration. A is a director in 19 public limited companies. He is offered the directorship of: (i) BC Private Limited; (ii) XYZ Ltd.; (iii) Indian Automobile Association, a company registered under Section 25 of the companies Act. Can [A accept these directorship? In the first case, A can accept the directorship of B.C. Private Ltd in view of the provisions of Section 278 (1) (a), because private company which is neither a subsidiary nor a holding company of a public company is not to be counted in calculating the number of 20 directorship which is the maximum limit prescribed by Section 275. In the second case too, A can accept the directorship of XYZ Ltd. because with this he becomes a director of 20 companies which is the prescribed maximum limit. In the third case as well. A can accept the directorship of the Indian Automobile Association because the directorship is also to be excluded from the computation of 20 directorship under Section 278 (1) (c).

A person who is proposed as a candidate for the office of director, is required to sign and file with the company his consent to act as director (if appointed). However, a director retiring by rotation or otherwise of a person who has left at

the office of the company a notice under Section 257 signifying his candidature for the office of a director, is not required to do so [Section 264 (1)]. A person shall not act as a director unless he has signed and filed with the Registrar his consent in writing to act as director within 30 days of his appointment [Section 264 (2)].

The provision does not apply to : (a) director re-appointed after retirement by rotation or immediately on the expiry of term of his office ; or (b) an additional or alternate director, or a person filling a casual vacancy under Section 262, appointed as director or re-appointed as an additional or alternate director immediately on the expiry of his term of office ; or (c) a person named as a director under the articles as first registered.

For registration of consent, see Form No. 29 of the Companies Central Government's Rules and Forms, 1956.

Appointment of directors must be voted individually : Each director be appointed by a separate resolution in the case of a public company unless the meeting first agreed by resolution that the appointment shall be made by single resolution and no vote has been cast against it. A resolution moved in contravention of this provision shall be voide, whether or not objection thereto was raised at the time it was so moved. Thus, two or more directors of a company cannot be elected as directors by a single resolution unless it is done in conformity with the provisions of Section 263. When such a resolution is passed, provision for automatic re-appointment of directors retiring by rotation shall not apply. Section 263 does not apply to a company whose articles provide for election of directors by ballot and which does not carry on business or prohibits the payment of a dividend to the members (Section 263 A).

Principle of proportional representation for appointment of directors : Under Section 265, a company can adopt the principle of proportional representation for the appointment of its directors, but only if its articles so provide. In such a case, not less than 2/3rds of the total number of directors shall be appointed according to the aforesaid principle, whether by the single transferable vote or by a system of cumulative voting or otherwise. Such appointments are to be made once in every three years and interim casual vacancies can be filled in accordance with the provisions, *mulatis mutandis*, of Section 262.

Share qualification for directors. It is that number of shares which a shareholder must hold in order to be eligible for election as a director. The Companies Act, 1956, does not prescribe for any share qualification for a director. However, Regulation 66 of Table A provides that the qualification for being a director of a company is the holding of at least one share in the company. The articles of a company usually prescribed for such qualification so that a director has a personal interest in the company. In the event of such a provision by the articles, it becomes incumbent on the part of every director to hold qualification shares and

if he does not hold them at the time of his appointment as director, he must acquire them within two months after his appointment as director. Any provision, made in the articles of the company requiring a person proposed for directorship to hold qualification shares either before appointment or within a period shorter than two months after his appointment, will be void. The nominal value of qualification shares must not exceed Rs. 5,000 and if the nominal value of each share is Rs. 5,000 or more, then the number of shares prescribed as qualification will be only one. It is, of course, not necessary for any company to insist upon the holding of shares for the purpose of qualification for directors. For the purpose of share qualification, the bearer of a share warrant is not deemed to be the holder of the shares mentioned in the warrant (Section 270). A director acting without qualification shares is punishable with fine which may extend to Rs. 50/- for every day during which he continues as a director (Section 272). The provisions relating to the share qualification of a director do not apply to a private company, unless it is subsidiary of a public company (Section 273); nor do they apply to directors appointed by the Central Government under Section 408.

Managing Director: The managing director is a director who, by virtue of agreement with the company or of a resolution passed by a company in general meeting or by its Board of Directors or, by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would hot otherwise be exercisable by him and includes a director occupying the position of a managing director, by whatever name called [Section 2 (26)]. However, affixing of common sea sniging of cheques, share certificates, etc. alone would not amount to substantial powers of management. A managing director must exercise his powers subject to the control of the Board.

Certain persons not to be appointed as managing director: After the commencement of this Act, a company cannot appoint a person as its managing or whole-time director who: (a) is undischarged insolvent or has at any time been adjudicated an insolvent; (b) suspends or has at any time suspended payment to its creditors or makes or has at any time made a composition with them; or (c) is or has at any time been convicted by a Court of an offence involving moral turpitude (Section 2.7).

The term "moral turpitude" needs a little elaboration. According to American Encyclopaedia of Law, it comprises anything done contrary to justice, honesty, principle of good morals, an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen or society in general. The term also comprises anything contrary to the accepted and customary rule of right and duty between man and man.

Appointment or reappointment of managing or whole time director to require Government approval in certain cases: Public companies and private companies which are subsidiaries of public companies cannot appoint a managing or whole time director without the approval of the Central Government. If they do so without

such approval, it shall have no effect. It means that the appointment does not forthwith become effective ; it remains abeyance until the Government gives its approval. Till then he cannot act as the in managing director or whole time director [Section-269 (1) as amended by the Companies (Amendment) Act 1975]. But the aforesaid appointment by the company incorporated after the commencement of the Companies (Amendment) Act, 1960, without the approval of the Central Government shall remain effective, i.e., such an appointee may act as such for 3 months from the date of such incorporation. But his appointment will be ineffective if after the expiry of the said 3 months, the appointment has not been approved by the Central Government [Proviso to Section 269 (ii)].

According to the explanation added to the sub-section (1) by the 1974 Amendment Act, the terms "appointment" and 'whole-time director", mentioned in sub-sections (1), (3) & (5) includes "re-appointment" and 'a director in the whole-time employment of the company'.

In the case of a public company or its private subsidiary which is in existence the re-appointment of a person as a managing or whole-time director after the commencement of the Companies (Amendment Act, 1960 shall be effective only after it has been approved by the Central Government Section 269 (2)].

The Central Government's approval, referred to in sub Section (1), shall be given only if it is satisfied about all the following matters : First it is in the interests of the company to have a managing or whole-time director. Secondly, the proposed managing or whole-time director of the company is in Government's opinion, a fit and proper person to be appointed as such and that his appointment is not against the public interest. Lastly, the terms and conditions of his appointment are fair and reasonable [Section 269 (3) as introduced by the 1974 Amendment Act). While according to this approval, the Central Government may lessen the proposed period of his appointment if it thinks such lessening to be necessary the interests of the company (Section 269 (4) as newely added in 1974).

In the case of the disapproval of the appointment by Central Government, the incumbent shall vacate his office as such on the date of the Central Government's communication of its decision to the company. If the incumbent so omits or fails to vacate his office, he shall be punishable with fine which may extend to Rs. 500 for every day during which he omits or fails to vacate such office [Section 269 (5) added anew in 1974].

A public company and a private company which is a subsidiary of a public company cannot appoint or employ any person as managing director if he is the managing director or manager of any other company including a private company which is not a subsidiary of a public company, except as provided in Section 316 (2). The aforementioned category of the company, however, may appoint or employ one as its managing director if he is the managing director or manager of one (and not more than one) other company (including a private company which is not a subsidiary of public company [*Section 316 (2)*]. But such an appoinment or employ-

ment must have been made or approved by a resolution passed at a Board meeting with the consent of all the directors present treat and a special notice for this meeting and the resolution must have been given to all the directors then in India [*Proviso to Section 316 (2)*]. Thus, a person cannot be a managing director for more than two companies simultaneously. But the Central Government has the power to permit a person to be appointed as a managing director of more than two companies where it is satisfied that it is necessary that the companies should, for proper working, function as single unit and have a common managing director [*Section 316 (4)*]. The term of office of a managing director of a public company or a private company which is the subsidiary of a public company shall not be more than 5 years at a time (Section 317).

A managing director is appointed usually to perform such functions and carry out such duties as may be assigned to him by the Board of Directors to whom he is subject [*Holdsworth & Co (Wakefiled) Ltd. v. Caddies, 1955 I All E.R. 725.*

In the context of Section 316, you must note that the term "whole-time director" signifies any director who devotes his whole or substantially the whole of his working hours to the work of the company. An employee who is also a director may be the whole time director where the company employs him for the whole time. For the purposes of Section 316 a director-in-charge or whole-time director may be deemed to be in the same position as a managing director. Now a valid question arises as to what is the basis for deeming a whole-time director to be in the position of the managing director when the Section is not explicit about it. It is true that Section 316 does not expressly provide for its application to the cases of whole time directors as other sections, e.g., Section 318 Section 269, do. But you know that the approval of the Central Government is required in all appointments to the office of whole-time director. Consequently, it is possible that the provisions of Section 316 may be applicable to whole-time directors.

Vacation of office by director. The office of a director shall become vacant if (1) he fails to obtain within the prescribed time (two months) or ceases to hold thereafter the qualification shares when he is so required by the articles; (ii) he is found to be of unsound mind by the Court; (iii) he applies to be adjudged an insolvent ; (iv) he is adjudged as an insolvent ; (v) he is convicted by a Court of an offence involving moral turpitude and is sentenced to imprisonment for not less than six months ; (vi) he does not pay the call in respect of shares held by him within six months from the last date fixed for the payment. The Central Government can, by notification in Official Gazette, remove this disqualification; (vii) without obtaining leave of absence from the Board, he absents himself from three consecutive meetings of the Board or from all meetings thereof for a continuous period of 3 months, whichever is longer; (viii) he, whether by himself or by any person for his benefit or on his account or any firm in which he is a partner or any private company of which he is a director, accepts a loan or any guarantee or security for a loan from the company without previous approval of the Government

as required by Section 295 ; (ix) having been appointed a director by virtue of his holding any office or other employment in the company, he ceases to hold such office or other employment in the company ; (x) he fails to disclose his interest in a contract or a proposed contract by the company as required by Section 299 ; (xi) he is ordered by the Court under Section 203 to be disqualified from acting as director of the company ; (xii) he is removed by the company in annual general meeting in pursuance of Section 284 ; and (xiii) he holds any office or place of profit in the company or its subsidiary without the consent of the company accorded by a special resolution.

Notes :—(i) An alternate director vacates office when the original director returns [Section 313 (2)]. (ii) A person vacates the office of director automatically in such other company after the expiry of 15 days if he, while holding directorship in 20 companies, is appointed director in other companies unless he gives notices of choice [Section 277 (1) (b)]

Resignation of director : A director can resign from his office. For this purpose, he must serve a notice of his resignation upon the company [*Municipal Freehola Co. v. Polington (1890) 63 L.T, 239*]. Palmer, however, is of the view that if the articles permit a director to resign at any time, the resignation will be effective from the time of the service of the notice. There is no need for its acceptance by the Board or the company in general meeting. If, however, the articles contain no such provision then the resignation of the director will be effective only when he serves notice on the company or the Board and the resignation is accepted by them.

A verbal resignation is enough, though articles usually provide for a written notice [*Latchford Premier Cinkma Ltd, v. (1931) 2 Ch. 439, Sawyer v. Mann (1938) 184 LT. 42*] But a managing or governing or whole-time director cannot resign merely by giving a notice. In his case, a formal acceptance of resignation by the company is essential so as to make it complete and effective. This is because he occupies two positions or possesses two capacities, viz., (i) one that of a director, and (ii) the other that of a manager or officer of the company in the sense of a whole-time employee. An employee cannot give up office at his pleasure, simply by giving notice. The notice or the letter of resignation is required to be approved or accepted by the company and the officer concerned has to be relieved of his duties and responsibilities attaching to the office which he has resigned from [*Achutha Pal v. Registrar of Companies, (1956 36 Comp. Cas. 598*]. However, in the case of an ordinary director, formal acceptance of resignation is not needed [*Abdul Huq v. Katpadi Industries Ltd. A.I.R. 1960 Mad. 482*]. A director cannot withdraw his resignation, without the consent of the company, even if such withdrawal is sought before the Board considered the resignation (*Glossop v. Glossop (1907) 2 Ch. 370 : Laksmana Mudaliar v. Emperor (1932) 2 Comp. Cas. 370*]. Where the articles of a company provide that a person shall be a director for life or until he resigns, a director so appointed will not be entitled to damages against the company for wrongful termination of contraction the company going into liquidation ; the reason is that the articles

operate only so long as company exists and it must be deemed to have been contemplated by the articles that the office shall come to an end on the company going into liquidation [*Re-Farrer* (*1931*) 2 *L.R.R.* 505].

Removal of directors (Section 284): A director (other than a director appointed by the Central Government under Section 408) may be removed from the office by an ordinary resolution before the period of office expires. But he cannot be removed in this way if the director of a company holding office for life on April 1, 1952. It is further provided that the directors appointed on the principle of proportional representation under Section 265 cannot be removed by an ordinary resolution as aforesaid. Special notice shall be required for a resolution to remove a director under Section 284. On receiving the notice of this resolution, the company must forthwith send a copy thereof to the director concerned, and the director shall be entitled to be heard on the resolution at the meeting. The director can make a representation in writing, a copy of which shall have to be sent to every member to whom the notice of the meeting is sent. If the copy of the representation is not sent either due to its having been received too late or d e to the company's default, the director may get the representation read out at the meeting. However, the copy of the representation need not be sent out at meeting if, on the application of either the company or any other person claiming to be aggrieved, the Court is satisfied that these rights are being abused to secure needless publicity for defamatory matter.

The vacancy resulting from the aforesaid removal may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given. A director so replaced holds office for the remaining period for which the director who has been removed would have held office had he not been removed. If the members of the company do not fill the vacancy, the Board of Directors may fill it as a casual vacancy. But the directors who was so removed from office shall not be re-appointed by the Board when the casual vacancy is filled.

The abovementioned provisions do not deprive any director, so removed, of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or of any appointment terminating with that as a director (Section 284).

Passing of resolution by circulation: Certain powers of the directors which are enumerated in Sections 262, 292, 297, (3), 372 (5) and 38 and (5) (59) of the Companies Act must be exercised by them only at the meetings of the Board. But other powers of the directors which are not expressly required to be exercised at the Board's meeting can also be exercised by means of resolutions passed by circulation. Moreover, Regulation 81 of Table A of Schedule 1 to the Act provides that "save as otherwise expressly provided in this Act, a resolution in writing, signed by all the members of the Board or of a committee thereof, for the time being entitled to receive notice of a meeting of the Board or Committee duly convened and held".

Section 289 lays down the procedure for the passing of resolution be circulation. A resolution is deemed to have been duly passed by the Board or by Committee thereof by circulation only if :—

(i) the resolution has been circulated in draft along with the necessary papers to all the directors or to all the members of the committee then in India (not being less in number than the quorum fixed for a meeting of the Board or (Committee), and to all other directors or members of their usual address in India ; and

(ii) the resolution has been approved by such of the directors as are then in India, or by a majority of them, as are entitled to vote on the resolution.

Self-Examination Questions (*not to be answered for evaluation. Answers may be sent at the end of the Study Papers*) ?

1. It is admitted that a body corporate is a *juridica persona.* But how can an abstract bady function or carry on business ?

2. What are the functionaries called both individually and collectively in the field of Company Law ?

2. Are these functionaries nominated or elected and by whom ?

4. Of the propositions comprised in the following statements, state which is correct.

(a) Directors (i) are not trustees as conceived by the Indian Trusts Act (ii) are trustees of the company's assets which are or come under the directors' control and they must act in the interests of the company only.

(b) Directors are trustees (i) for the company (ii) for the shareholder (iii) for the creditors (iv) for the individual shareholder (v) for outsiders.

(c) The law of agency (i) governs (ii) does not govern the relationship between the company and its directors.

(d) Directors are (i) agents of the company (ii) agents of the share holders.

(e) Where the directors exceed their powers the company can ratify their acts (i) if the acts are *ultra vires* the company, (ii) if the acts are *intra vires* the company.

(f) Directors (i) do stand (ii) do not stand, in a fiduciary position towards the company in regard to powers conferred on them by the articles.

5. What is the maximum number of directors, prescribed by the Act that a company may have ?

6. What is the minimum number of directors that a company must have :

(a) when it is public company ;

(b) when it is a private company ; and

(c) when it is a "deemed public" company ?

7. State whether the following statements are true or false :

(a) A body corporate or a firm or an association of persons can be a director of another company.

(b) Generally articles cannot name the first directors.

(c) Articles may provide that both the number and the names of the first directors must be determind in writing by the subscribers to the memorandum.

(d) The tenure of office of the first directors ends on the last date of the first annual general meeting of the company.

(e) In the case of a public company subsequent directors can be appointed an extraordinary general meeting.

(f) Out of the total number of directors of a public company or its private subsidiary, only 2/3rds of them can be given permanent appointments.

(g) The rest of the director, i.e., 1/3rd of them, are liable to retire by rotation.

(h) The object of the provisions as regards rotation of directors is to do away with the mischief done by self perpetuating managements.

(i) Of the 2/3rds rotational only 1/3rd shall go out at one general meeting.

(j) Those who are longest in office will retire last because their long experience is beneficial to the company.

(k) When two directors are appointed on the same day, their retirement will be determined by a lottery.

(l) The vacancies caused by such retirement must be filled in the same meeting in which the directors retire.

8. Where the vacancies caused by rotational retirement have not been filled in or any decision not to fill them up has not been taken either, then what will be the fate of this issue.

9 In the context of your answer to Q. 8, if no fresh appointment is made or if no decision against appointment is take, can the retiring directors been deemed to have been re-appointed ?

10. The articles of a company fix the maximum number of directors at 12, whereas the company actually has 6 directors. What type of resolution will be necessary if the number is proposed to be increased to (a) 12 (b) 5 (c) is the approval of the Central Government necessary in both the cases ?

11, Can the Board of Directors appoint additional directors ?

12. Can the Board fill a casual vacancy by a resolution passed by circulation ?

13. A director of a company has gone out of the State for 2 months, and the Board desires to appoint an alternate director in his stead. Can it do so ?

14. Can a minor become a director ?

15. Is it necessary that a person must be a graduate of a University if he wants to become a director of a company ?

16. What are the disqualifications for directorship ?

17. In how many companies can a person hold directorship at a time ?

18. A public company appoints three directors by a single resolution.

(a) Will the appointments be valid ?

(b) Would there be any difference in your answer if the meeting had first unanimously agreed that the appointment would be made by a single resolution ?

19. (a) Does the Act prescribe any share qualification for a director ?

(b) Can the articles provide for it ?

2. Can you be compelled to take the said qualification share ;

(a) Before your appointment as director :

(b) Any time after your appointment which is shorter than 2 months ?

21. The nominal value of the qualification shares must not exceed Rs. 5,000. But if it does not exceed this amount what would then constitute the share qualification for directorship ?

22. Does the Act provide for situations for automatic vacation of the office of director ?

23. An ordinary director can resign verbally, or in writing informing the company of his resignation and leave the office forthwith ; but a managing or whole-time director cannot vacate his office in this manner and his resignation has to be formally accepted. Can you account for this distinction ?

24. The articles of a company provide that a person shall be a director for life or until he resigns. In terms of the articles the director was so appointed. When the company went into liquidation his services were terminated. Could he claim compensation against the company for his termination ?

———

Validity of acts of director : All the acts of a director or a committee of the Board shall be valid notwithstanding that his appointment was afterwards discovered to be invalid by reason of any defect or disqualification or by reason of the appointment being terminated by virtue of any provision contained in the Act or in the articles of the company. But this provision of law shall not have the effect of validating the acts of a director after his appointment has been shown to the company to be invalid or to have been terminated (Section 290). But where there was no appointment at all, the acts of such *de facto* directors are not protected. This protection applies only to defects in appointment discovered after the appointment.

Thus, if a director, whose term of office has expired, acts as a director, such acts cannot be regarded as valid ; that is not a defect afterwards discovered (*Karnal Distillery v. Ladli Parshad, A I.R. 1960 Punj. 655*).

It has been held in *Morris v Kanssen* 1945 I All E.R. 586 that this rule is intended to be a machinery to avoid calling into question the validity of transactions when there has been a slip or irregularity in the appointments of directors and to override substantive provisions of law relating to such appointments. The presumption as to the validity of acts of directors would not cover the case where there has not been any appointment at all.

Director to act as a Board : Directors must act together as a body and generally, at meeting properly convened, unless special powers are delegated to an individual director. Every company must hold a meeting of the Board of Directors once in every three months and at least four such meetings shall be held in every year. (The Central Government can by notification direct that the provision of Section 285 shall not apply to any class of companies or shall apply in a modified form). These provisions shall not be deemed to have been contravened merely by reason of the fact that the meeting of the Board which had been properly called could not be held for want of a quorum [Section 288 (2)]. Notice of the Board's meeting must be given in writing to every director for the time being in India, and at his usual address in India (Section 286). The quorum for a meeting of the Board of Directors must be one-third of its total strength (any fraction contained in that one-third being rounded off as one), or two directors whichever is higher. Provided that where at any time the number of interested directors exceeds or is equal to two thirds of the total strength the number of directors who are not interested and who are present at the meeting not being less than two shall be the quorum. There must be at least 2 non-interested directors. (Section 287). If the meeting could not be held for want of quorum, then unless the articles otherwise provide, the meeting shall automatically stand adjourned till the same day in the next week at the same time and place, or if that day is a public holiday, till the next succeeding day which is not a public holiday, at the same time and place [Section 288 (1)]. Section 289 contains conditions which must be complied with for the passing of a resolution by circulation. The resolution must be circulated in draft along with necessary papers to all the directors, or to all the members of the Committee, not being less than the quorum fixed for the Board meeting then in India and to other directors and members at their usual addresses in India, also the resolution must have been approved by such of the directors as are there in India, or by a majority of such of them as are entitled to vote on the resolution.

Powers of directors and restrictions thereon : The Board of directors is entitled to exercise all such powers of the company and to do all such acts and things as the company is authorised to exercise and do. But the Board shall not exercise and power or do any act or thing which is, by the Act or any other statute or by the memorandum or articles of the company, or otherwise, required to be exercised by the company in general meeting. In exercising such powers the

Board shall be subject to regulations made by the company in that general meeting (Section 291). But this 'subject to regulations' does dot mean that the company in general meeting can override the Board's powers of carrying on this business, by prescribing a regulation, or passing a resolution, taking away the powers which have been conferred upon the Board by the articles [*Automatic Self Cleaning, etc. Co v. Cunningham (1906) 2 Ch. 34*].

In generality, the statement in the question is quite correct. The powers cover all the day-to-day activities of the company and the actions of the Board of Directors cannot be called into question However, in no case, can the directors usurp the powers vested by the articles in the body of shareholders, nor can the shareholders usurp the powers vested likewise in the Board of Directors (*Murarka Paint & Varnish Co. Ltd. v. Mohanlal A.I.R. 1961 Cal, 251. A.P. Pathon v. Hindustan Trading Corporation, A.I R. 1966 Ker. 149*).

The directors, being agents, are naturally subject to the will of their principals, viz., the shareholders. Also because of the need to protect the interest of the shareholders of the company and in the public interest, the law has imposed certain restrictions on the powers of the Directors—the most important of these are contained in Section 293 of Companies Act. The general powers of the Directors are subject to the following limitations:

(i) The Board of Directors must necessarily act according to the Memorandum and the Articles of Association. The implication of this is that certain powers, which are *ultra vires* the company, cannot be exercised by the Board or the shareholders. The acts which are *intra vires* the company *i.e*, those powers which the company is entitled to exercise and the activities that the company can engage itself in, fall within the purview of the Board of Directors generally, unless the Articles specifically reserve them for shareholders. For example, it is common that declaration of the dividend is reserved for the shareholders, to be decided upon at the Annual General Meeting (Regulation 85 of the Table A of Schedule I to the Companies Act).

In case, power is reserved for the shareholders by the Articles and the Directors happen to exercise that power, it is possible for the shareholders to ratify the action of the Board ; in the final analysis, the power is exercised by the shareholders and not by the Directors.

(ii) Certain powers can be exercised only by the shareholders under law. In these, the Directors clearly have no authority. Some of the prominent examples are given below :

(a) Issue of shares at a discount Section 79 (2) (i).

(b) Undertaking lines of business other than those mentioned in Memorandum as the main object including those auxiliary to those [Section 149 (2A)].

(c) Selling or otherwise disposing of company's undertaking or substantial part of the undertaking (Section 293).

(d) Investing, otherwise than in trust securities, the amount of compensation received by the company in respect of compulsory acquisition of the company's undertaking or of any premises or property used for in such undertaking (Section 293).

(e) Borrowing in excess of the aggregate of paid up capital plus free reserves (Section 293).

(f) Contributing in any financial year, to charitable and other funds not relating to the company's business, amounts exceeding Rs. 50,000 or 5% of its average net profits during the three preceding financial years whichever is greater (Section 293 as amended by the Companies (Amendment) Act, 1977 coming into force from December 24, 1977).

(g) Issuing bonus shares or debentures.

(h) Re-organisation of capital and amendment of Articles or Memorandum of Association (Sections 94, 31 and 16 respectively).

(i) Winding up unless ordered by the Court (Section 484).

(j) Appointment of sole selling agents. However, in this case, the Board can make the appointment subject to approval of the company in a general meeting within 6 months of the appointment (Section 294).

It follows that except in certain special matters, the Board of Directors can exercise all the powers and carry on all the activities that are necessary to achieve the objects of the company. A distinction, however, is necessary between the following three categories of powers and activities :

(1) Those powers and the activities in respect of which the Directors have complete discretion.

(2) Those activities where approval of the shareholders is required but the third parties would be protected if the Board acts without the consent of the company powers (iii) to (vi) mentioned above fall in this category.

(3) Powers which only the shareholders can exercise, sometimes, subject to the approval of the Central Government.

Certain powers exercisable with the consent of the general body meeting : Under Section 293 the Board of Directors of a public company cannot, except with the consent of the company in general meeting –

(i) sell, lease or otherwise dispose of the whole, or substantially the whole, of the company's undertaking, or where the company owns more than one undertaking, of the whole or substantially the whole of any such undertaking.

Any resolution permitting the aforementioned transaction may attach such conditions to the permission as may be specified in the resolution. Such conditions may include those regarding the use, disposal or investment of the sale proceeds which may result from the transactions ;

(ii) remit, or give for the repayment of, any debt due by a director ;

(iii) invest otherwise than in trust securities, the amount of compensation received by the company in respect of the compulsory acquisition of any such undertaking as is referred to in clause (i) or of any premises or properties used for any such undertaking and without which it cannot be carried on or can be carried on only after a considerable time ;

(iv) borrow moneys where the moneys to be borrowed together with the moneys already borrowed by the company will exceed the aggregate of the paid-up capital of the company and its free reserves, (i.e., reserves not act apart for any specific purpose). Temporary loans (i.e., loans repayable on demand or within 5 months from the date of the loan, such as, short-term cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character but does not include loans raised for the purpose of financing expenditure of a capital nature) obtained from the company's bankers in the ordinary course of business are not covered by this provision.

However, if a bank, in the ordinary course of its business, accepts deposits of money from the public repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, such acceptance must not be deemed to be a borrowing by the bank within the meaning of clause (iv) above. A debt incurred by the company in excess, of the ceiling placed by clause (iv) above, shall not be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the aforesaid limit had been exceeded ; and

(v) contribute to charitable and other funds not directly related to the business of the company or the welfare of its employees, any amounts the aggregate of which will, in any financial year, exceed Rs. 50,000 or 5% of its average net profits during the three financial years preceding whichever is greater.

As regards the exercise of the power mentioned either in para (iv) or (v) above, the resolution in the general meeting must specify the total amount up to which moneys may be borrowed or total amount which may be contributed to charitable and other funds in any financial year.

(vi) appoint a sole selling agent for any area ; the appointment may be made in the first instance without the approval of the general meeting but it will be subject to the subsequent approval by the company in the first general meeting held after the date on which the appointment is made [Section 294 (2)].

(vii) appoint a director to hold any office or place of profit (excepting that of managing director, manager legal or technical adviser, banker or trustees for the holders of debenture of the company), special resolution being needed therefor ; the consent of the company or its subsidiary in general meeting is necessary (Section 314).

(viii) make loan to or give guarantee, or provide security in connecting with a loan made by any person to or to any person by, another company except where

the aggregate of loans made to companies not under the same management as the lending company does not exceed 10% of the aggregate of the subscribed capital and free reserve of the lending company (not applicable to banking insurance and purely private companies and companies established for financing industrial enterprises) (Section 370).

(ix) to commence any new business ; there is the necessity of a special resolution being passed by the company in its general meeting [Section 149 (2A)].

Tutorial Note : The list of the above-mentioned powers is not exhaustive but illustrative. It should be borne in mind that there are instances of other powers needing general body meeting's consent.

N.B. Section 293A relating to the making of political contribution has been abolished by the Companies. (Amendment) Act, 1969 with effect from May, 27 1969. Therefore, neither a company nor its Board can now contribute fund of any political party person.

Powers to be exercised by Board only at its meeting : According to Section 292, the following powers can be exercised by the Board only by means of resolutions passed at its meetings :

(a) to make calls ;
(b) to issue debentures ;
(3) to borrow moneys otherwise than on debentures ;
(d) to invest the funds of the company ;
(e) to make loans.

The Board may, however, by resolution passed at a meeting, delegate the last three powers mentioned above to the extent specified hereunder. Such a delegation can be made to any committee of directors, the managing director, the manager or any other principal office of the company or in the case of a branch office of the company, a principal officer thereof. Every resolution delegating the power referred to in (c), (d) and (e) above shall specify : (i) if the total amount outstanding at any time up to which moneys may be borrowed by the delegate ; (ii) the total amount up to which the funds may be invested as well as the nature of investments ; and (iii) the total amount of loans and the purpose thereof up to which and for which loans may be raised respectively. It is to these extents that the aforesaid three powers may be exercised by the delegate. The company in general meeting may impose restrictions and conditions on the exercise by the Board of any of the five powers mentioned above.

In connection with the power mentioned in (c) above, a question may arise whether borrowing on a promissory note is within the powers of the directors. It has been held in *P. Rangaswami Reddiar and Another v. R. Krishnaswami Reddiar and another* (1971) 43 Comp. Case 232 that where such a borrowing was permissible under the company's articles and moneys were borrowed on promissory notes, such transactions would come within the powers of the directors. It has also been held

in the same case that where a person was appointed as the managing director of the company by the Board's resolution vested with full powers of the management of the affairs of the company and authorised to sign all the papers of the company, he would have full powers to borrow money on a promissory note even without a resolution of the Board as contemplated by Section 292 (c) of the Act.

(f) receive notice of disclosure of shareholdings of directors under Section 307 [Section 308 (2)].

(g) fill in casual vacancies in the Board (Section 262) ;

(h) sanction or give consent to contracts of or with any director [Section 297 (4)] ; and

(i) receive notice of disclosure or interest (Section 299);

The following powers may be exercised by a resolution passed at the meeting only with the consent of all the directors present at the meeting.

(1) To appoint a managing director or manager a person who is a already managing director or manager of another company [Ss. 316 (2) & 386 (2)]

(2) To sanction investments in companies in the same group [Section 372. (5)].

Consideration of a few complicated problems based on powers of directors : Having read the directorial powers in detail it would be worthwhile to consider a few problems on these powers. The Directors of X & Co. Ltd. desires to authorise the Managing Directors to enter into the following transactions namely—(a) invest from time to time surplus funds in the purchase of shares of other companies; (b) borrow from banks money required for the purpose ; (c) give loans to persons, including firms in which directors or their relatives are partners ; (d) give donations to charitable trusts in which any of the directors may be interested as trustees. Let us now examine one by one the validity or otherwise of the aforesaid transactions and also examine the measures to be taken for the proper implementation of the above proposals.

(a) Although Section 292 empowers the Board of Directors of a company to delegate to the Managing Director the power to invest, in general terms, the funds of the company, nevertheless because of the overriding provisions of Section 272(5) (which Section we shall discuss in detail in Study Paper 3), the transaction in the instant case would be invalid. Section 372 (5) provides that no investment in shares of a company can be made by the Board of Directors of an investing company in pursuance of sub-Section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting except those not entitled to vote therein, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in Section 286. Since Section 372 does not provide for delegation of the power, the proposed delegation to the Managing Director in question, notwithstanding the general provision of Section 292, cannot be made.

(b) In terms of Section 292 the Board of Directors may also delegate to the Managing Director the power to borrow money otherwise than on debentures which it can exercise only by means of resolutions, passed at Board meetings. As per Explanation II to Section 292(1), it is the arrangement for an overdraft or cash credit that constitutes the exercise of the borrowing power and not the actual utilisation of the arrangement. In other words, an arrangement for an overdraft of cash credit to the tune of say Rs. 5 lakhs constitutes the exercise of the borrowing power and not the actual drawing of this amount on the basis of the overdraft or cash credit. Consequently, the transaction in the instant case shall be valid. But before implementation of the proposal, the Board must pass a resolution at its meeting, authorising the Managing Director to borrow from banks moneys required for the purpose of the company's business. Also the resolution delegating this power shall specify the total amount outstanding at any one time up to which moneys may be borrowed by the delegate.

If, however, the moneys to be borrowed together with the money already borrowed by the company (apart from temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of the paid up capital of the company and its free reserves, that is to say, reserves not set apart for any specific purpose, the Board of Directors of the company in question must obtain the consent of the company in its general meeting. Consequently, care should be taken to ensure that while delegating the power to the managing director the aforesaid provision has not been violated ; also it should be ensured that the memorandum of association permits borrowing.

(c) Since according to Section 295(1), (which we shall discuss later) without obtaining prior approval of the Central Government in that behalf, a company cannot directly or indirectly lend money to persons including firms in which directors or their relatives are partners, the company in question must in the first instance seek the Central Government's approval. Secondly, since the power to make loans may be delegated under Section 292 (1) (e), the Board of Directors of the company in question must pass a resolution therefor, and every resolution delegating this power to the Managing Director shall specify the total amount up to which loans may be made by the delegate, the purpose for which the loans may be made and the maximum amount of loans which may be made for each such purpose in individual cases. Thirdly, by virtue of Section 291 (1), the Board must see with reference to the memorandum and articles whether the company is authorised to exercise the power.

(d) Under Section 293 (1) (e), the Board of Directors of a public company can contribute or donate to charitable and other funds not directly related to the business of the company or the welfare of its employees any amount the aggregate of which will not, in any financial year exceed Rs. 50,000 or 5% of its average net profits during the three financial years preceding, whichever is greater. If this power of the company is not *ultra vires* the memorandum of the company, then only the Board can act in pursuance of the above-mentioned resolution of the

company and in so acting, it can authorise the Managing Director to exercise the power on behalf of the Board.

It may be noted that the power of the Board to donate to general charities is not conditional to the existence of any profits. In such case, they may contribute up to the limit given in Section 293 (1) (e). even though the company may be working at a loss.

Self-Examination Questions (*Not to be answered for evaluat'on. Answers are at the end of the Study Paper*).

25. K and C were directors. At a bogus meeting of directors S was appointed a director and C and S purported to remove K from the Board. Later, G and S acting as directors allotted shares to M. Before the allotment M had notice that K was contesting the validity of the appointment of S. Would the allotment be valid ?

26. A director whose term of office has expired continues to act as a director. Can his act be regarded as valid in the circumstances ?

27. Can a director act individually ?

28. The law requires that the Board must meet at least once in every three months. The last meeting of the Board was held on January 5. The next meeting cannot be held on April 4 as most of the directors would remain out of India till 29th April. Would it be proper if the meeting is held on 30th April ?

29. Has the Act prescribed the maximum number of meetings per year for one Board of Directors ?

30. The last meeting of the Board held on March 3 and the next meeting was convened on June 30. On that day the meeting could not be held for want of quorum It was argued that it was a flagrant contravention of law which made it mandatory for the Board to meet at least once in three calendar months. Don't you agree with this argument ?

31. What is the quorum necessary for a Board meeting in the following circumstances :—

(a) Where the total number of direction is 9.

(b) Where it is 11.

(c) Where it is 3.

(d) Where the total number is 12, all are present but 10 are "interested directors' within the meeting of the Act.

32. When a meeting cannot be held for want of quorum, does it stand dissolved ?

33. Can the Board pass a resolution by circulation ?

34. Can a company in general meeting override the Board's power of carrying on business by prescribing a regulation or passing a resolution, taking away the powers which have been conferred upon the Board by the articles of the company ?

35. What are the acts that can be performed by the Board of a public company only with the consent of the company in general meeting ?

36. The powers (i) to make calls ; (ii) to issue debentures ; (iii) to borrow moneys otherwise than on debentures : (iv) to invest the funds of the company ; and (v) to make loans can be exercised by the Board only by means of resolution passed at the general meeting of the company. Is it a correct statement ?

37. The Board has the requisite sanction through resolutions borrow otherwise than on debentures, to invest the funds of the company and to make loan. Can the Board delegate any of these powers on the basis of the said sanction.

Loans to directors, etc. : We will presently see from our discussion hereunder that a company's powers of lending money to its directors is strictly regulated by the Act. A company, without obtaining prior approval of the Central Government in that behalf, cannot directly or indirectly lend money, or guarantee or secure the loans advanced by any other person to : (a) a director of the lending company or that of its holding company or partner or relative of any such director (b) any firm in which any such director or relative is a partner ; (c) any private company of which any such director is a or member ; (d) anybody corporate 25% or more of whose total voting power may be exercised or controlled by any such or by two or more such directors together ; (e) any body corporate, the Board of Directors, managing director or manager whereof is accustomed to act in accordance with the directions or instructions of the Board or of any director or directors of the lending company [Section 295 (1)].

The impact of the aforesaid provision is that it prohibits the company not only from directly lending money to its directors but also from giving any guarantee for a loan taken by a director from any other person and providing any security for such loan. The Section too prohibits the providing of any guarantee or security for a loan advanced by a director to any person.

The above resolutions do not apply to loans, etc., advanced by private company or by a holding company to its subsidiary. Similarly, any guarantee or security provided by the holding company in respect of any loan made to its subsidiary do not attract the provisions referred to above,

It is thus clear from the foregoing discussion that under Section 295, a company cannot give loan or advance to its director without obtaining the pre-sanction of the Central Government in that behalf. Now suppose that the directors of a public company have to travel often for company's business. The company makes some advances to them for this purpose which sometimes exceeds the

actual requirements. In such a case can the company be deemed to have contravened the provision of Section 295 ? It seems that advances pertaining to travelling expenses are outside the ambit of Section 295, because such advances are not in the nature of loans, and are meant to meet expenses on behalf of the company. Therefore, the provisions of Section 295 (1) are not contravened, but the directors are bound to keep the advances in excess in trust for the company.

Steps to be taken by a company for granting House-building loan to its whole-time director :

(i) In terms of Section 292 (1)(e) the Board of Directors of a company can exercise to power to give loans only by means of a resolution passed at the Board meeting. Therefore, the management of the company has to convene a Board meeting and pass thereat a resolution sanctioning the loan amount of Rs. 75,000.

(ii) By virtue of Section 295 (1), prior to making any such loan, the management will have to obtain the approval of the Central Government, since the company in question is a public company.

(iii) Such loan being for house-building, the guidelines issued by the Central Government for the availability of such loan have to be followed. Accordingly, though there is no prescribed form or the purpose, yet an application has to be made to the Central Government, and along therewith the undermentioned information and documents will have to be furnished for expeditious disposal of the application, namely—(a) amount of loan ; (b) particulars of X in the instant case ; (c) the precise period within which the loan is to be recovered; (d) the rate of interest ; (e) the nature and value of security offered by X ; (f) the circumstances in which and the objects for which the loan is sought by X ; (g) the grounds on which it is considered expedient to invest Everlending Corporation Ltd's money in this manner rather than utilising the funds in any other way ; (h) the sources from which the lending will be financed; (i) composition of the Board of Director of Everlending Corporation Ltd. ; (j) one copy each of the audited balance sheet and profit and loss account for the latest three financial years of the lending company ; (k) any other information having a bearing on the loan transaction. The Central Government, before granting the approval, will examine : (a) the purpose for which the loan is to be granted ; (b) nature of the security or guarantee ; (c) the financial position of X and Everlending Corporation Ltd. ; (d) whether the lending company possesses surplus funds to lend ; (e) the rate of interest ; and (f) whether the loan is for a definite period.

(iv) The management will have to address the application to the Secretary, Department of Company Affairs, Shastri Bhawan, New Delhi-110001 and and attach thereto a treasury challan evidencing the payment of the requisite fee paid under the Companies (Fees and Applications) Rules,

1968 into any of the branches of the Punjab National Bank through a challan for credit under the head of account, "Major Head 104—Other General Economic Services—Regulation of Joint Stock Companies—Fees Realised by the Central Government on Applications made to it under the Companies Act 1956".

(v) On the receipt of the approval of the Central Government, the management can disburse the loan amount.

Disclosure of interest in contracts : A director who is directly or indirectly interested in any contract or arrangement—whether actual or proposed—made by or on behalf of a company must disclose his interest at a meeting of the Board of Directors.

Regarding a proposed contract or arrangement, a disclosure must be made at the Board's meeting at which the question of entering into it is first taken into consideration : if at the date of that meeting the director was not concerned or interested therein then the disclosure is to be made at the first Board's meeting held after he becomes so concerned or interested. As regards any other contract or arrangement, the disclosure must be made at the first Board's meeting, held after the director becomes concerned or interested. Every director who fails to comply with the aforementioned provisions shall be punishable with fine extending up to Rs. 5,000. For example. P is one of the 5 directors of X & Co. Ltd. At a meeting of the Board of directors, a resolution with all the 5 votes in favour is passed approving a proposal to enter into a building contract with Y & Co. Ltd. in which P has the majority shareholding. In the circumstances. P should have made the disclosure of the nature of his concern of interest at the stated meeting of the Board of Directors whereas the resolution was passed unanimously ; otherwise P would be punishable with fine as aforesaid.

For the purpose of the above-mentioned disclosure, a director may give a general notice to the Board that he is a director or a member of a specified body corporate or is a member of a specified firm and therefore is to be regarded as concerned or interested in any contract which may, after the date of the service of the notice, be entered into with that body corporate or firm. Such a notice shall be deemed to be a sufficient disclosure of interest or concern in relation to any contract or arrangement so made. Such a general notice shall automatically expire at the end of the financial year in which it is given, but it may be renewed for further period of one financial year at a time by a fresh notice given in the last month of the financial year in which it would otherwise have expired. Such a general notice or renewal thereof is to be given at the Board's meeting or the director concerned must take reasonable steps to ensure that it is brought up and read at the first meeting of the directors held after the said notice is given. But as regards any contract or arrangement entered into or to be entered into between two companies where any of the directors of one company (or two more of them together) holds (or hold) not more than 2% of the paid-up share capital in the other company, no disclosure is needed (Section 299). Therefore, if P in our illustration cited earlier

does not hold more than 2% of the paid up share capital of Y & Co. Ltd. he need not make any disclosure. The resolution passed at the Board meeting of X & Co. Ltd. need not make any disclosure. The resolution passed at the Board meeting of X & Co. Ltd. in respect of the contract with Y & Co. Ltd., would be valid even if P did not disclose his interest.

Under Section 300 (1), a director is forbidden from taking part in the discussion of or voting on any contract or arrangement (or any proposed contract or arrangement) entered into by or on behalf of the company, when he is directly or indirectly interested in it. Although he may be present at the meeting, his presence will not count for the purpose of quorum at the time of any such discussion or vote. If the interested director votes, his vote shall be void. In this connection it may be noted that the voting on the contract or arrangement by the interested director, of itself, does not invalidate the contract or arrangement, only the vote of the interested director is to be excluded. If, as a result of such exclusion there is no quorum, the resolution sanctioning the contract would be void, i.e., a nullity and as such the contract would be incapable of subsequent ratification. [*Firestone Tyre & Rubber Co. v. Synthetic and Chemicals (1970) 2 Comp. L.J. 200*].

The provisions mentioned above shall not apply to :

(i) a private company which is neither a subsidiary nor a holding company of a public company ;

(ii) a private company which is a subsidiary of a public company in respect of a contract or an arrangement entered into by the private company with the holding company ;

(iii) any contract of indemnity against any loss which the director may suffer by reason of becoming sureties for the company ;

(iv) any contract or arrangement entered into (or proposed contract or arrangement) with a public company or a private company which is subsidiary of a public company in which the interest of the director consists (a) in his being a director of such company and the holder of the requisite qualification shares and he having been nominated as such director, or (b) in his being member holding not more than 2% of its paid up-share capital.

(v) a public company or a private company which is a subsidiary of a public company in respect of which the Central Government in the public interest issues a notification thereof having regard to the desirability of establishing or promoting any industry, business or trade. However, the Central Government may direct that the provision of Section 300 (1) shall apply to these companies subject to such exceptions, modifications and conditions as it may specify in the notification in the foregoing circumstances. [Section 300 (2) and 3)].

According to Section 297, a director of the company or his relative, a firm in which such a director or relative is a partner, any other partner in such a firm, or a private company of which the director is a member or director, must not enter

into contracts with the company for the sale, purchase, or supply of goods, service or for underwriting shares or debentures except with the consent of the Board of Directors [sub-section (1)]. According to the provision to sub-section (1) inserted by the 1974 Amendment Act, in the case of a company having a paid-up capital of Rs. 1 crore or more, no such contract shall be entered into *except with the previous approval of the Central Government*. The consent of the Board is deemed to have been given only if it is accorded by a resolution of the Board and not otherwise, either before or within three months of the date of entering into the contract. If consent has not been given, the contract would be voidable at the option of the Board [sub-section (4)].

If the consent is not accorded to any contract under Section 297, anything done in pursuance of the contract shall be voidable at the option of the Board [sub-section (5)] Before we proceed on to discuss the other provisions contained in Section 297 (2) & (3), let us examine a situation. X & Co. Ltd., has a director who is a partner in a share broking firm. In a recent public issue made by X & Co. Ltd., the said share-broking firm also acted as the brokers to the issue. Can the appropriate brokerage be paid to such a firm by the company ? In view of the legal position just stated, the appropriate brokerage can be paid to the brcking firm if the contract had been entered into with the consent of the Board of Directors of X & Co. Ltd. Moreover, as you had seen earlier while we were discussing Section 299 the director in question is required to disclose his concern or interest at the first meeting of the Board of X & Co. Ltd. held after the director becomes concerned or interested in the contract. A general notice given in this regard to the Board by the director in question is deemed to be a sufficient disclosure of his concern or interest, if either it is given at a meeting of the Board of director concerned takes reasonable step to secure that it is brought up and read at the first meeting of the Board after it is given.

The conditions under which the sanction of the Board of Directors in respect of contracts by directors or persons connected therewith would not be required [as contained in sub-Section (2) of Section 297] have been liberalised. The restrictions do not apply to :

(a) the purchase of goods and materials from, or sales thereof to, the company for cash at prevailing market prices ;

(b) any contract or contracts between the company and directors or persons connected therewith in respect of sale, purchase or supply of goods in which the parties to the contract regularly trade or do business in ; provided they are in respect of goods and material, or services the value whereof or the cost of service would not exceed Rs. 5,000 in aggregate in any year comprised in the period of the contract ;

(c) the transactions by banking or insurance company entered into with any director, relative, firm, partner, etc., in the ordinary course of his business.

Section 297 (3) provides that a director or persons connected with him may enter into a contract in the circumstances of urgent necessity without obtaining consent of the Board, even if the value of such a contract exceeds Rs. 5,000 in the aggregate, but in such a case the consent of the Board must be obtained at meeting within three months of the date of entering into the contract.

Having read the provisions of Sections 279 and 299, let us now test for ourselves how far we have been able to grasp them with particular reference to the following problem : A & Co. Ltd. wants to sell its products to its following customers : (a) A partnership firm in which two of the directors of the company are partners ; (b) A private company in which one of the directors of the company is a member ; (c) A public company in which one of the directors of the company is a director. In these three cases what steps are required to be taken by A & Co. Ltd. ?

(a) & (b). According to Section 297, except with the consent of the Board of Directors of a company, *firm* in which the director or directors of the company is/are partners or a *private company* of which such director or directors is or are a member or members shall not enter into any contract with the company for the sale, purchase or supply of any goods, materials or services. Therefore, the public company in the instant two cases should obtain the consent of its Board of Directors. This consent shall have to be taken by a resolution passed at the Board meeting and not otherwise. The resolution according the consent must be passed before the contract to sell the product is entered into or within 5 months of the date on which it was entered into ; otherwise consent shall not be deemed to have been given. If the consent is not accorded, anything done in pursuance of the contract shall be voidable at the option of the Board. Care should be taken to ensure that the interested directors do not vote on the motions and their presence is not counted for the purpose of quorum for the meeting. Also it is to be seen that such directors have disclosed their interests in the contract pursuant to Section 299 of the Companies Act unless any of them is enjoying the exemption under sub-Section (6) of the above Section.

The consent contemplated above is not a general consent but a consent referable to each particular or specific contract or contracts. Consent requires a knowledge of the necessary facts and material which lead to the consent and cannot be given in general or abstract manner (*Walchand Nagar Industries Ltd.* v. *Ratanchand, A.I.R. Bom. 256*). Therefore, the Board of the public company should take appropriate steps in this regard.

(c) The point of the case in question relates to disclosure of interest by directors. According to Section 299 (6), nothing in Section 299 shall apply to any contracts entered into or to be entered between two companies where one of the directors of the one company or two or more of them together holds or hold not more than 2% of the paid up share capital in the other company. This point is not clear from the facts in the problems. This is a contract to be entered into between

two companies. And if the director of the first company holds 2% or less of the paid-up share capital in the second public company, the provisions of Section 299 will not apply to this case.

If, however, the said director holds more than the aforesaid 2% then the Board of Directors should see that the director, pursuant to Section 299, discloses his interest or concern at the meeting of the Board. This disclosure has to be made at the Board meeting at which the contract is considered. If the interest is acquired subsequent to the meeting, then it is to be disclosed at the immediately next meeting.

The Board of the first-mentioned public company should ascertain whether the interest of director aforesaid consists solely (1) in his being a director of such company and the holder of not more than shares of such number and value therein as is requisite to qualify him for appoinment as a director thereof, he having been nominated as such director by the company, or (ii) in his being a member holding not more than 2% of its paid-up share capital. Also, there is no restriction on voting, etc, by interested director if a notification had been issued by the Central Government under Section 300 (3) exempting the company from the purview of Section 300. If on such assertion the interest is not found to be so consisting as aforesaid, the Board of the company should see that interested director does not participate in the discussion or vote on, the contract and that his presence is excluded from the computation of quorum.

Register of contracts, companies and firms in which directors are interested : Every company shall keep one or more registers in which particulars of all contracts, or arrangements to which Section 297 or Section 299 applies shall be entered. These particulars should include the following to the extent they are applicable in each case : (a) the date of the contract or arrangement; (b) the names of the parties thereto ; (c) the principal terms and conditions thereof ; (d) in the case of contract to which Section 297 applies or in the case of a contract or arrangement to which Section 299 (2) applies, the date on which it was placed before the Board ; (e) the names of the directors voting for or against the contract or arrangement and the names of those remaining neutral.

The particulars of every such contract or arrangement to which either of the above-mentioned Sections applies must be entered in the register within 7 days of the receipt at the registered office of the particulars of contract other than the one requiring the Board's approval or within 30 days of the date of that contract whichever is later ; in the case of a contract requiring the Board's approval, within 7 days (exclusive of public holidays) of the meeting of the Board at which the contract is approved. On these entries being made, the register is required to be placed before the next meeting of the Board, whereupon it shall be signed by all the directors present at the meeting. The register must also specify, in relation to each director of the company, the names of the firms or bodies corporate of which notice has been given by him under Section 299 (3). However, the particulars as regards

contracts the value of which does not exceed Rs. 1,000 in the aggre gate any year or as regards contracts entered into by a banking company for collection of bills or as regards any transactions referred to in Section 297 (2) (c) are not required to be entered in the register. Violation of the afore-mentioned provision would render the company and every officer thereof (in respect of each default) punishable with fine up to Rs. 500 (Section 301).

Register of directors, managing director, manager and secretary Section 302): Every company must keep at its registered office a register of directors, managing director, manager and secretary, and send to the Registrar in the prescribed form within 30 days of the appointment of the first directors, a return in duplicate containing particulars specified in the register and must notify the Registrar or any subsequent changes within 30 days of the happening thereof. This notification also must be submitted in duplicate in the prescribed form.

The above mentioned register must contain the following particulars :

(i) In the case of an individual, his present (and former) name and surname in full ; his father's name and surname in full or where the indiviual is a married woman the husband's name and surname in full ; his usual residential address, nationality, business occupation if any ; particulars of office (if and *e g.*, that of director, mana;ing director, manager or secretary in any other body corporate) : the date of birth ;

(ii) In the case of a body corporate its corporate name and registered or principal office, etc.

(iii) In the case of a firm, the name of the firm etc. ;

(iv) If any director or directors have been nominated by a body corporate, its corporate name and all the particulars mentioned in (i) and (ii) :

(v) If any directer or directors have been nominated by a firm, the firm name and all the particulars mentioned in (i) and (iii) above.

For the purpose of the aforesaid provisions any person in accordance with whose directions, or instructions, the Board of Directors of a company is accustomed to act shall be deemed to be a director of the company.

Inspection of the Register (Section 304): The register mentioned in Section 303 must be open to inspection by any member of the company free of charge. But a person other than the member can inspect it on payment of one rupee for each inspection. If the inspection is refused, the company and every office thereof who is in default is punishable with fine extending up to Rs. 50. Also the Court may, by order, compel an immediate inspection of the register.

In built protection against abuse of fiduciary capacity of directors : By now, you know that the position of a director *vis-a-vis* the company is that of an agent who may not himself contract with his principal also that it is similar to that of a trustee who, howsoever fair a proposal may be, is debarred from letting a position

arise where his interest and that of the trust may conflict. To ensure that the authority vested in the directors is not abused, a number of provisions have been included in the Companies Act and in the articles of association also. For instance, in the absence of provisions in the articles, a director is precluded from entering into a contract with the company. If in such a case he does enter into a contract then the company is entitled to have the contract set aside or to sue, at its option, the director for breach of duty. That is why the articles of almost all companies contain a provision authorising the directors to enter into a contract with the company. In order to restrain the directors from entering into contracts which are prejudicial to the companies, the Act has enacted a number of provisions. These provisions have the effect either of invalidating contracts entered into by directors unless they have been sanctioned by the Board of Directors, or of disqualifying the director who is interested in a contract from continuing as a director unless he has made a disclosure of his interest therein. These provisions are contained in Sections 297, 299, 300, 301 and 302.

All the foregoing provisions are calculated to prevent a company from entering into contract with directors except on a commercial basis.

Register to be kept by Registrar (Section 306): The Registrar shall maintain a separate register wherein he shall enter the particulars received by him under Section 303 (2) in respect of companies, so however that all entries in respect of each such company shall be together. This register shall be open to inspection by any member of the public at any time during office hours, on payment of the prescribed fee. The register should be in Form No. 34 of the Companies (Central Government's) General Rules and Forms 1956. According to a decision of the Punjab High Court (*Jullundur Dt. Registered Factory Owners' Association v. Registrar of Companies, 1961*, Comp. Cas, 673), where returns under Section 303 (2) have been made by rival claimants, the registrar should wait for the decision of the Court on the conflicting claims before making entries in his separate register of the particulars furnished by either party.

Register of directors' shareholding etc, (Section 307): A company must maintain a register showing, as regards each director, the number, description and the amount of shares in or debentures of the company or any other body corporate, being the company's subsidiary or holding company, or a subsidiary of the company's holding company, which are held by him, or in trust for him, or of which he has any right to become the holder whether on payment or not. Apart from these entries, there must be an indication in the register of the nature and extent of any interest or right in or any shares or debentures recorded in relation to a director The register must also show the date of each transfer of shares or debentures and the price or other consideration therefor if the transaction has been entered into after the commencement of the Act (*i e.*, April 1, 1956). The register shall be kept at the registered office of the company. During the period beginning 14 days before the date of the company's annual meeting, and ending 3 days after the date of its

conclusion, any member or holder of the debentures may inspect it; but during this period or any other period, any person acting on behalf of the Central Government or the Registrar may inspect it. Further the Central Government or the Registrar may at any time, require a copy of the register or any part thereof. Furthermore, it must be produced at the commen cement of every annual general meeting and kept open and accessible during the continuance of the meeting to any person having the right to attend the meeting.

Any default in the matter of the entries referred to in Section 307 (1) and (2) is punishable with the fine extending to Rs. 5,000 and also with a further fine extending to Rs. 20 for every day during which default continues. Similar punishment is leviable in case any inspection required under Section 307 is refused or in case a copy required under this Section is not sent within a reasonable time. In the the case of refusal, the Court may compel an immediate inspection of the register. The provisions of Sections 307 and 308 shall apply to managers as they apply to directors.

Managerial remuneration: The manager of a company, subject to the provisions to Section 198, may receive remuneration either by way of a monthly payment or by way of specified percentage of the net profits of the company calculated in the manner laid down by the Act or partly by one way and partly by the other. But remuneration must not exceed in the aggregate 5% of the net profits, except with the approval of the Central Government (Section 387).

The Directors' remuneration is controlled by the provisions of Sections 309 and 198. However, the remuneration is determined either by the articles of the company or by a resolution, or if the articles so require, by a special resolution passed by the company in general meeting. A director is entitled to receive a sitting fee for each meeting of the Board or Committee thereof, provided the same is authorised by the articles or by a resolution of the shareholders passed at general meeting. In addition, a whole-time or a managing director can be paid remuneration either by way of monthly payment or a specified percentage of the net profits of the company or partly by one way and partly by the other. But the amount paid, except with the approval of the Central Government, must not exceed 5% of the net profits for each such director and if there is more than one such director, 10% for all of them together.

Further a person who is neither in the company's whole-time employment nor a managing director thereof can be remunerated by way of a monthly, quaterly or annual payments with the approval of the Central Government by way of commission subject to the same being authorised by the company by a special resolution The remuneration paid to such a director, or where there is more than one such director, to all of them, cannot exceed 1% of the net profit where the company has a managing or whole-time director or a manager, and 3% in any other case. The Central Government may authorise the payment of remuneration in excess of the limits mentioned above; this must also be approved by the company in general meeting.

It may be noted that the total remuneration payable to directors and managers is subject to the provisions of Sections 198, i.e., it must not exceed 11% of the net profits of the company in the year concerned. Such percentage is exclusive of any sitting fees payable to directors under Section 309 (2). If, in any financial year, such a company has little or no profit, it may subject to the approval of the Central Government (unless such approval has been obtained under any other provisions of the Act), pay to its directors (including whole-time or managing director) or manager or if there are two or more of them holding office in the company, to all of them together by way of minimum remuneration, not exceeding Rs. 50,000 per annum exclusive of any sitting fees payable to directors under Section 309 (2).

But, where a monthly payment is being made or is proposed to be made to any managing or whole-time director or the manager or any one or more of them and the Central Government is satisfied that for the efficient conduct of the business of the company, the minimum of fifty thousand rupees per annum is or will be insufficient, the Central Government may by order sanction an increase in the minimnm remuneration to such sum, for each period and subject to such conditions (if any) as may be specified in its order.

It may also be noted that for the purpose of calculating the maximum amount of remnneration payable to a director, all payments made for services rendered in any other capacity, except for those of a professional nature, must be taken into account.

Where any director draws or receives (directly or indirectly) by way of remuneration any such sum in excess of the aforementioned limits or without the prior sanction of the Central Government (where it so required) he must refund such sums to the company and until such sum is refunded, he must hold it in trust for the company.

However, it should be noted that Section 637 AA as inserted by the 1974 Amendment Act, the Central Government has been empowered to fix, while according approval to any remuneration under Sections 309, 310, 311 or 387, the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company as it may deem fit. The Central Government may exercise his power in spite or anything contained in Section 198, Section 309 or Section 637 A.

Payment of tax-free remuneration to employees and directors : Under Section 200, a company cannot pay its officer or employee any tax-free remuneration. Since, under Section 2 (30), the term 'officer' includes a director, the payment of tax-free remuneration even to a director of a company is also forbidden. The expression "tax" comprises any kind of income-tax including super-tax.

It may, however, be noted that despite Section 200 of the Companies Act, Section 10 (6) (viia) of the Income-tax Act 1961, provides that in the case of foreign technician of the class specified therein and employed by a company, the

tax on his income chargeable under the head "salaries" may be paid by the company for a period of 24 months following the expiry of tax-free period of 24 months from the date of his arrival in India.

Assignment of office by director : Any assignment of office made after the commencement of the Act by any director is void (Section 312).

It was held in *Oriental Metal Pressing Works Private Ltd.* v. *B.K. Thakoor (A.I.R.) 1960 Bom. 167* that the appointment of one as managing director by the will of one D was void in view of the provisions contained in Section 312, since, according to the High Court, the words 'any assignment' were comprehensive enough to include every assignment or transfer of office of a director or of the appointment by a director of a person to the office of a director in his place, whether by a deed *inter vivos* or by a will. But this ruling has been reversed by the Supreme Court (*vide A.I.R. 1961 S.C. 573*). The Court considers that the word 'assignment' in Section 312 does not mean or include appointment. From its very nature, transfer inevitably imports the passing of a thing from one person to another. A transfer without the passage of the thing, even when that being is an office is inconceivable. On the other hand, an 'appointment' has nothing to do with passing from one person to another ; it connotes the putting in of someone in a vacancy. So transfer and appointment are dissimilar. It would be an unusual statute which by using a single word, intended to prohibit at the same time, two wholly different acts. A construction leading to such a result cannot be permitted.

Section 255 of the Act envisages an appointment by a director of another person as director to take his office against a vacancy caused by his resignation or death or expiration of the term of his office. There will be nothing illegal, if such an appointment has been made by will. If the word assignment in Section 312 is interpreted as including 'appointment' Section 312 will come into conflict with Section 255. The object of Section 312 was not to prevent a director from appointing his successor. Sections 254 and 317 of the Act do not even impliedly indicate that there should be no perpetual management. Section 255, on the other hand, shows that the Act did not look up on it as an evil which required precaution.

Thus, where the managing director of the aforesaid company, while exercising his power under the articles, appointed by his 'will' one G as the managing director to hold the office after his death, the Supreme Court, reversing the Bombay High Court's decision in this regard, has held that the exercise of the power was legal under Section 255 and did not offend Section 312

Compensation for loss of office : The Companies Act permits payment by a company to managing director, or a director holding the office of manager or being in the whole-time employment of the company, by way of compensation for loss of his office. But no such payment can be made to a part-time director [Section 318 (1) & (2)]. Also it cannot be paid in the following circumstances

namely, (i) where the director resigns on account of the company's reconstruction or on account of its amalgamation with any other body or bodies corporate and is appointed as the managing director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation; (ii) where the director resigns otherwise than on reconstruction or amalgamation mentioned in (i) above; (iii) where the directorship has been vacated under Section 203 and Section 283 (1) (a) to (h); (iv) where the company is being wound up—voluntarily, compulsorily or subject to the supervision of the Court—provided the winding up was due to the negligence or default of the director; (v) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement at the conduct of the affairs of the company or any subsidiary or holding company thereof; (vi) where the director has instigated or has participated in bringing about the termination of his office.

The compensation admissible to the aforementioned category of directors for loss of office must not exceed the amount of remuneration which they would have earned if they had remained in office for the unexpired residue of their term or for 3 years whichever is shorter. The calculation of this amount should be based on the average remuneration actually earned by them during a period of 3 years immediately prior to the date on which they cased to hold the office, or where they held the office for a period shorter than 3 years, during such period. No such payment would be admissible if the winding up has commenced before or at any time within 12 months after the cessation of their office and the assets of the company are insufficient to repay the shareholders their share capital (Section 318).

Any amount proposed for payment to a director as compensation for loss of office or for consideration of retirement in connection with transfer of undertaking must be disclosed to the members and approved in the general meeting (Section 319). Furthermore, a director is prohibited from receiving a payment by way of a compensation for loss of office or for retirement in circumstances stated in Section 320 (1) either from the company or from the transferee of shares or any other person. Such a director must take all reasonable steps to secure that all particulars with respect to payment proposed to be made by the transferees or other persons are included in or sent with any notice of offer made for their shares which is given to any shareholders. A default in taking the reasonable steps would entail a fine extending up to Rs. 250 (Section 320).

Payment of pension and gratuity to a retiring whole-time director. You have noticed above that under Section 318 (1), a company is permitted to make a payment to its whole-time director as consideration for his retirement from office. Further, according to Section 318 (4), the amount of such payment must not exceed his remuneration calculated on the average remuneration actually earned by him during a period of 3 years immediately preceding the date on which he ceased to hold the office, or where he held the office for a lesser period than 3 years, during such period. According to the opinion of the Company Law

Board, monetary benefits given in any form to *inter alia* a retiring whole-time director are deemed to be an increase his remuneration. For the purpose, the approval of the Central Government will be required (Press Note date 9th August, 1963). In view of this, if a company proposes to pay pension and gratuity to a whole-time director who is shortly retiring then it should apply for the approval of the Central Government in Form No. 26 of the Companies (Central Government's) General Rules and Form, 1956, inasmuch as the payment of pension and gratuity can be construed as "monetary benefits in any form", stated above.

Self-Examination Questions : (*Not to be answered for evaluation. Answer may be seen at the end of Study Paper*).

38. A public company wants to make loans to its directors. Can it do so ?

39. Can a private company make loans to any firm in which one of the relatives of its director is a partner, without the previous approval of the Central Government ?

40. According to law, a director who is directly or indirectly interested in any contract or arrangement—whether actual or proposed—made by or on behalf of a company must disclose his interest.

(a) Where should it be disclosed if it is an "actual" contract ?

(b) Where should it be disclosed if it is a "proposed" contract ?

41. (a) Can an interested director vote on, participate in the discussion of, any contract into ?

(b) Will he be counted for purposes of quorum ?

42. The sanction of the Board of Directors is a 'must' for certain contracts in which particular directors are interested.

(a) What are those contracts ?

(b) Can this consent be obtained by a resolution need by circulation ?

43. What will be the effect of the contract referred to in Q. 42, if the sanction of the Board has not been obtained within 3 months after entering into the contract ?

44. Will the said transaction be in order, if the Board accords its sanction to the said contract say 4 months after it is entered into ?

45. Is the maintenance of the following compulsory ?

(a) Register of contracts, companies and firms in which directors are interested.

(b) Register of directors, managing director, manager and secretary.

(c) Register of directors' shareholdings ?

46. If a director assigns his office, what will be the consequence of such an assignment ?

47. The managing director of a company, while exercising his power under the articles appointed by his will one as the managing director to hold the office after his death.

(a) Was the exercise of the power legal ?

(b) Didn't it offend against the provision of the Act that any assignment of offence by a director would be void ?

48. Is compensation payable for the loss of his office to the following personnel ?

(a) To a director ;

(b) To a director who has resigned ;

(c) To a director whose directorship has been vacated in terms of the specific provisions of the Act ;

(d) To a director where the company was being wound up for reasons for which such director was not all responsile in any way.

(e) To a managing or whole-time director or to a manager.

Liability of Directors : The liability of a director should be considered from the following standpoints (i) Directors may become liable to shareholders in multifarious ways. (ii) They may also become liable to third parties in certain cases ; the liability may be civil and/or criminal.

(1) Liability to shareholders.

(a) *Negligence.* A director may become liable to shareholder for negligence Where the directors acting within their powers, fail to exercise as much reasonable skill and diligence as may be expected from person with their knowledge and experience in the management of the affairs of the company, they can be held liable for negligence (*Re : City Equitable Fire Insurance Co. 1925 Ch. 407*). They are, however, not liable for errors of judgement as a result of which a loss might have been caused to the company provided they acted *bona fide* for the benefit of the company and with such a case as may be reasonably expected of them. The burden of proving bad faith in such a case lies on the person who challenges the act of the directors.

(*b*) *Misfeasance and breach of trust* : "Misfeasance" and "breach of trust" are allied heads of liability. The former is defined as any breach of duty in the conduct of the company's affairs, which causes loss to the company ; the latter is confined to any misapplication of the funds of the company (Palmer—p. 190). Thus the payment of dividend out of capital (*Filicroft's case*), is a breach of trust. On the other land, allotment of shares to an infant or giving a fraudulent preference to a creditor, or to commit any breach of articles would be misfeasance.

(c) Ultra vire acts: Where directors do any act which is in excess of their powers, *e g.*, borrow money or create a mortgage which is beyond their authority as defined by the articles such an act is called *ultra vires* the directors. If however, it is not beyond the powers, of the company as laid down by the memorandum, the shareholders may, by subsequent ratification, make the act, which is *ultra vires* the directors but *intra vires* the company, valid and binding on the company. But two points must be established for upholding ratification. These are : (1) that the shareholders who ratified had full and clear knowledge of the act of the directors ; and (2) that all the shareholders ratified and not merely those who were present at the meeting. The ratification can be made by a formal resolution at any ordinary general meeting or at an informal meeting of the shareholders.

(d) Act of co-directors: A director is not responsible for the acts and defaults of co-director, unless he has expressly or impliedly authorised the same [*Cargil* v. *Bower 10 Ch. D. 502.* The directors are jointly and severally able for a breach of trust.

(II) Liability to third parties:

(a) Insofar as contracts entered into by directors on the company's behalf are concerned, the directors cannot be generally held personally liable for the same, for they act as agent of the company. But they may be personally liable if they act, without the authority of the company, on the ground of a breach of warranty of authority ? This personal liability may attach to them when they have expressly or impliedly undertaken to be personally responsible for their act.

(b) If the directors commit or authorise a tortious act, they are personally liable therefor even if they have been acting as agents of the company. Likewise they would be personally liable for commitment or authorisation of fund, *e.g.* issue of a fraudulent prospectus. But a director would not be liable for the fraud of his co-director, unless it has been authorised by him, or he has participated therein.

(c) Certain liabilities have also been imposed by the Act as regards director *qua* third parties, *e g.*, for mis statement in prospectus under Section 62 to prospective subscribers ; for irregular allotment under Section 71 ; for failure to return application moneys where minimum subscription has not been raised within the prescribed period, under Section 69 ; for similar failure mentioned under Section 73, etc.

Directors' rights and liabilities for their ultra vires act ; The acts of directors which may be regarded as *ultra vires* are two-fold in nature, namely, (a) the act which are beyond their authority but within the company's powers (*i.e.*, *intra vires* the company). and (b) the acts which are beyond the director's authority as well as the company's. The rights and duties which emanate from *ultra vires* acts, we shall discuss hereunder.

(i) Under the Act, the funds of a company can be applied in carrying out its permitted objects. Therefore, if an *ultra vires* payment is made by the directors

of company, *e.g.*, payment of the interest out of capital they may be to compelled to repay the money to the company even after it goes into liquidation (*In re-Sharpe (1982) 1 Ch. 154*. But the directors so compelled to refund the money to the company could claim to be indemnified by the payees when received the money from the directors with the knowledge that the payment to them was *ultra vires*. The reason for this rule of indemnification is that in such a case, the payees would be constructive trustees of that money (*Russel* v. *Wakefield Water Works Co., I.R. 20 Eq. 474*).

(ii) You have read earlier that the directors are the agents of the company. That's why they cannot do anything which the company itself cannot do under its memorandum. But if they make a contract within the powers of the company (*i.e., intra vires* the memorandum) but *ultra vires* the powers which the company by its articles has conferred upon them, then company may *ratify* the contract in *general meeting* and be bound by it (*Grant* v. *United Kingdom Switchback Railway (1888) 40 Ch. D 135*). If, however, the company does not ratify such contract then the company will not be bound by the contract. Consequently the directors will remain liable to the other party to the contract for the breach of an implied warranty of their authority (*Weeks* v. *Profest (1873) L.R. 8 C.P. 427*; *Starkey* v. *Bank of England, 1903) AC. 114.*)

Directors with unlimited liability : In a company with limited liability, the liability of the directors, like that of any other members, is limited to the amount remaining unpaid of their shares. However, a limited company may, if the memorandum permits have directors with an unlimited liability. If a limited company has the powers under its articles it may also alter its memorandum by a special resolution so as to make the liability of its unlimited (Sections 322 and 323).

Directors' reports : According to Section 217, the directors are under an obligation to make out and attach to every balance sheet laid before a company, in general meeting a report with regard to the state of affairs of the company ; the amount (if any) which they recommend as dividends, the amount if any which they propose to carry to any reserves in such balance sheet and the material changes and commitments (if any) affecting the financial position of the company which have occurred between the end of financial year to which the balance sheet relates and the date of the report.

The report shall deal with any changes which have occurred during the financial year (i) to the nature of the company's business, (ii) in the company's subsidiaries or in the nature of the business carried on by them and (iii), generally in the class of business in which the company has an interest. However, such matters are to be disclose. so far as these are material for the application of the state of the company's affairs by its members and will not, in the Boards opinion be harmful to the business of the company or any of its subsidiaries. The Board must also give the fullest information and explanations in its report or in case falling

under the proviso to Section 222, in an addendum to the report, on every reservation, qualification or adverse remark contained in the auditor's report. The report and any addendum thereto must be signed by the chairman of the Board if he is authorised by the Board; otherwise, it is to be signed by such number of directors as are required to sign the balance sheet and profit and loss account of the company by virtue of Section 215. In default of compliance with these provisions, each of the directors and chairman signing the report without the Board's authority shall be punishable with imprisonment for a term extending up to six months or with fine up to Rs. 2,000 or with both. But no person is to be sentenced to imprisonment for such offence unless it was committed wilfully.

Duties of directors: The duties of directors may now be summarised as follows:

(i) Since the directors are in fiduciary position, their duties are onerous. As you know, they are the trustees of the money of the company in the bank as well as of the property of the company. They are also agents in the transactions entered into by them on behalf of the company. Therefore, they must act in utmost good faith and take as much case as a man of ordinary prudence would take in respect of his own affairs. In other words, they will have to exercise all the powers they are vested with only in this fiduciary capacity. You must remember that a director is a trustee only of the company and not of the shareholders thereof. Therefore, though he may possess inside information which may augment the value of shares, yet he is not obliged to disclose the information to a shareholder who offers to sell his shares to the director [*Percival* v. *Wright* (*1902*) *2 Ch. 421*)]. However, in exceptional circumstances, the director may own a fiduciary duty to shareholders as well, *e.g.*, where directors are negotiating terms of sale of issued shares of the company. That is where the directors approach the shareholders and not *vice versa* for sale of shares.

(ii) He is required to evince as much skill as is expected from a person of his knowledge and experience—thus far and no further.

(iii) Every director must act honestly. A director shall be liable to the company for any of his underhand dealings irrespective of whether or not the company suffers on account of such underhand dealings. Causing share to be allotted to a minor, sale by director to company without the disclosure of his interest fraudulent misrepresentation to co-directors enticing them into advancing money to him on insufficient security, taking of bribes. etc, are some of the instances of dishonest acts. Where a director derives any secret benefits or accepts any bribes or any other illegal gratifications, he must account for them and make them over to the company *Eden* v. *Ridsdale Co. 23 Q B.D. 368*). A company may repudiate a contract if it has been induced by bribes *Shipway* v. *Broadwood* (*1899*) *1 Q.B. 369*; *Grant* v. *Gold Explanation Syndicate* (*1900*) *1 Q.B. 233*).

(iv) It is normally not the duty of the director to detect the frauds of the manager and the chairman of the company. He can, therefore, rely on co-direc-

tors and officers. If the duty of detection of fraud is cast on a director, anything like an intelligent devolution of labour will be impossible. But if there is anything that gives rise to the slightest suspicion, then he will be put on an enquiry. If he fails to make the requisite enquiry to allay his suspicion, then he will be guilty of dereliction of duty and be liable for damage emerging from such dereliction.

(v) It is the duty of a director to see that company's moneys are kept properly invested, unless the articles warrant the delegation of this duty to others.

(vi) It is incumbent upon directors to insist on some independent valuation of investments and fixed assets at appropriate intervals. Revaluation of immovable property may not be necessary for a considerable time, but revaluation of shares must be made once a year. In this regard, a director put any reliance on the assurances of the chairman or on the expression of the auditor's belief. Likewise auditor too must not rely on the directors' assurance.

(vi) Directors required to ensure the accurate compilation of the stock sheets and the physical checking of certain of these items being done by the auditors.

(viii) According to Palmer a list of cheques that the Board authorises is to be placed before each meeting of the Board.

(ix) It is the duty of the directors not to act in a manner prejudicial to public interest or oppressive to any members. If they so act, proceedings will be invoked against them under Section 397.

(x) Duties of director regarding take-over under Section 395. (Refer to F.S.P. (N) CL 3.)

Managing director : The managing director is a director who, by virtue of an agreement with the company or a resolution passed by a company in general meeting or by its Board of Directors or, by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him and includes a director occupying the position of a managing director, by whatever name called [Section 2 (26)]. However, affixing of common seal, signing of cheques, share certificates, etc. alone would not amount to substantial powers of management. A managing director must exercise his powers subject to the control of the Board.

No company can appoint or employ, or continue the appointment or employment, of any person as its managing or whole-time director who (i) is an undischarged insolvent or has at any time been adjudged an insolvent; (ii) suspends or has at any time suspended payment to his creditors or makes or has at any time made a composition with them ; (iii) is or has at any time been convicted by a Court of an offence involving moral stupitude (Section 267). In the case of a public

company or a private company which is subsidiary of a public company, the appointment of a managing director or whole time director for the first time will not be effective unless approved by the Central Government. In the case of companies incorporated after 28th December, 1960. Government approval can be obtained within 3 months after incorporation (Section 269). In the case of existing companies, re-appointment also requires Government approval. The approval of the Central Government is also necessary for amending any provision in relation to the appointment of a managing or whole time director or a public company or a private company which is a subsidiary thereof (Section 268).

A public company and a private company which is a subsidiary of a public company cannot appoint or employ any person as managing director if he is the managing director or manager of any other company (including a private company which is not a subsidiary of a public company, except as provided in Section 316(2). The afore mentioned category of company may, however, appoint or employ one as its managing director if he is the managing director or manager of one (and not more than one other company including a private company which is not a subsidiary of a public company [Section 316 (2)]. But such an appointment or employment must have been made or approved by a resolution passed at a Board meeting with the consent of all the directors present thereat and a special notice of this meeting and the resolution must have been given to the director then in India. [Proviso to Section 316 (2)]. Thus. a person cannot be a managing director for more than two companies simultaneously. But the Central Government has the power to permit a person to be appointed as a managing director of more than two companies where it is satisfied that it is necessary that the companies should, for proper working, function as a single unit and have common managing director [Section 316 (4)]. The term of office of a managing director of a public company or a private company which is the subsidiary of a public company shall not be more than 5 years at a time (Section 317).

A managing director is appointed usually to perform such functions and carry out such duties as may be assigned to him by the Board of Directors to which he is subject. [*Holdsworth & Co. (Wakefield) Ltd v Caddies 1955 I All E.R. 725*].

In the context of Section 316, you must note that the term "whole-time director" signifies any director who devotes his whole or substantially the whole of his working hours to the work of the company. An employee who is also a director may be the whole time director where the company employs him for the whole time. For the purpose of Section 316, a director-in-charge or whole-time director may be deemed to be in the same position as a managing director. Now a valid question arises as to what is the basis for deeming whole-time director to be in the position of the managing director when the Section is not explicit about it? It is true that Section 316 does not expressly provide for its application to the cases of whole-time director as other Section e.g., Section, 318, Section 269, do.

But you know that the approval of the Central Government is required in all appointments to the office of whole-time director. Consequently it is possible that the provision of Section 316 may be applicable to whole-time directors.

Remuneration of directors (Section 309) : This has been discussed already in studies on Accounting and Auditing.

Director not to hold office or place of profit : Except with the consent of the company accorded by a special resolution, (a) no director of a company shall hold any office of place or profit, and (b) no partner or relative of his, no firm in which he or his relative is a partner, no private company of which he is a director or member and no director or manager of such a private company shall hold any office or place of profit carrying a total monthly remuneration of Rs. 500 or more except that of managing director or manager, banker or trustee for the debenture-holders under the company or under any subsidiary of the company, unless the remuneration received from such subsidiary in respect of such office or place or profit is paid over to the company or its holding company.

The special resolution may be passed before or at the general meeting of the company held for the first time after the holding of such an office or place of profit. Further, where a relative of a director, or a firm in which such a relative is a partner is appointed to an office or place of profit in the company or a subsidiary thereof without the knowldge of the directors, the consent of the company may be obtained either in the general meeting held for the first time after the holding of such an office or within 3 months from the date of the appointment whichever is later [Section 314 (1) and the provision thereof].

But the above-mentioned provisions of sub-section (1) shall not be applicable to a case where the relative of a director or firm in which such relative is a partner holds any office or place of profit under the company or its subsidiary, if the said relative's or firm's appointment had taken place before the director in question became the director of the company [Section 314 (1A)].

A partner of a relative of a director or manager, a firm in which such director or manager or relative of either is a partner, or a private company of which such a director of manager or relative of either is director or member cannot hold any office or profit which carries a total monthly remuneration of Rs. 3,000 or more, *unless two conditions are fulfilled* : *first prior consent* of the company by *Special* resolution must be obtained. Secondly, the approval of the Central Government must be sought. But according to the proviso to this sub-section, if the office or place of profit carrying Rs. 3,000 or more as aforesaid is being held prior to the commencement of the 1974. Amendment Act then the company shall, within 6 months from the date of its commencement, obtain the approval at its general meeting as also the approval of the Central Government [sub section IB) introduced by the 1974 Amendment Act. If these approvals referred to in the above proviso are not taken within 6 months as aforesaid, then the director, partner, relative, firm,

private company or manager concerned shall be deemed to have vacated his or its office on and from the expiry of the said 6 months or the date next following the date of the general meeting whichever is earlier. In addition, he or it shall have to refund to the company the remuneration received or the monetary equivalent of perquisite or advantage enjoyed [Sec. 314 (2C) introduced by the 1974 Amendment Act].

When an office is held in contravention of the provision in sub-section (1), the director, partner, relative, firm etc., concerned shall be deemed to have vacated office from the date next following the date of the general meeting of the company referred to above or at the expiry of the period of three months as the case may be, and shall be liable to refund the company any remuneration received or the monetary equivalent of any perquisite or advantage enjoyed by him for the period immediately preceding the date aforesaid in respect of such an office or place of profit [Section 314 (2)(a)].

The company shall not waive the recovery of any sum refundable to it under Section 314 (2 (a), unless permitted to do so by Central Government [Section 314 (2) (b) added anew by the 1974 Amendment Act.].

Every individual, firm, private company or other body corporate proposed to be appointed to any office or place of profit shall, before or at the time of such appointment declare in writing whether he or it is or is not connected with a director of the company in any of the ways referred to in sub-section (1) [Section 314 (2A)].

It may happen that, after the commencement of 1974 Amendment Act, an office or place profit is held without the prior consent of the company by a special resolution and the approval of the Central Government. In such a case, the partner, relative, firm or private company appointed to it shall be liable to refund to the company any remuneration received or the monetary equivalent of any perquisite or advantage enjoyed by him on and from the date on which the office was so held by him [Section 314 (2B) introduced by the 1974 Amendment Act].

The company shall not waive the recovery of any sum refundable to it under sub-Section (2B) or (2C), as the case may be unless permitted to do so by the Central Government [Section 314 (2D) as added by the 1974 Amendment Act].

It may be noted that nothing in Section 314 shall apply to a person who, being the holder of any office or profit in the company, is appointed by the Central Government, under Section 408, as director of the company [Section 314 (4) added by the 1974 Amendment Act].

The aforementioned provisions are calculated to prevent directors from obtaining unfair advantages from the company by providing sinecures to their business associates and relations, without the knowledge of the shareholders.

Any office or place shall be deemed to be an office or place of profit under the company within the meaning of the Section :—

(a) in case the office or place is held by a director, if the director holding it obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled as such director, whether as salary, fees, commission, perquisites the right to occupy free of rent premises as a place of residence, or otherwise ;

(b) in case the office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it obtains from the company anything by way of remuneration whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise [sub-section (3)].

Removal of managerial personnel : In the principal Act, in part VI, a new Chapter *i.e.*, VIA) and Sections 388-B, 318-C, 388-D and 388-E dealing with the powers of the Central Government to remove managerial personnel from office on recommendation of the Court have been added.

A Reference to High Court of cases against managerial personnel : There can be circumstances relating the affairs of a company, which might suggest :

(a) that any person, concerned in the conduct and management of the affairs of a company is or has been guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligation and functions under the law, or breach of trust in connection therewith ;

(b) that the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles of prudent commercial practices ;

(c) that the company is or has been conducted and managed by such person in a manner which is likely to cause or has in fact caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains ;

(d) that the business is or has been conducted and managed by such person with an intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest.

If the Central Government is convinced that any one of the aforementioned circumstances exist, it may state a case against the person aforesaid and refer it to the High Court with a request that the High Court may enquire into the case and record its finding as to whether or not such a person is fit and proper to hold the office of director or any other office concerned with the conduct and management of any company.

The statement of the case should be in the form of an application presented to the High Court or such officer thereof as it may appoint in this behalf, and the person against whom such a case is stated and referred, should be joined as a respondent to the application. The application should contain concise statement of such circumstances and materials as the Central Government may consider as necessary for purposes of enquiry to be made by the Court. The application must be signed and verified in the manner laid down in the Code of Civil Procedure. 1908 for the signature and verification of a plaint in a suit by the Central Government.

At any stage of the proceedings, the High Court may allow the Central Government to alter or amend the application in such manner and on such term as may be just and all such alterations or amendments shall be made as may be necessary for the purpose of determining the real questions in the enquiry (Section 388-B)

B. *Interim order by High Court*: During the pendency of case before the High Court, certain situations might come to the knowledge of the High Court which might necessitate the passing of an interim order restraining, in the interest of the members or creditors of the company, the delinquent person against whom the case is pending, In such situations, the High Court may either on the application of the Central Government or on own its motion, by order direct that the respondent (delinquent person) shall not discharge any of the duties of his office until further order of the High Court, and appoint in his stead another suitable person to discharge the duties connected with the office of the respondent subject to such terms and conditions as the High Court, may specify in the order. The person who is temporarily called upon to discharge the duties in lieu of the respondent, will be regarded as a public servant within the meaning of Section 21 of the Indian Penal Code [Section 288 C].

C. *Findings of the High Court*: At the end of hearing of the case, the High Court shall record its findings. In the findings it must specifically state as to whether or not the respondent is a fit and proper person to hold the office of director, or any office and to be concerned with the conduct and management of the company [Section 388 D].

D. *Powers of the Central Government to remove managerial personnel*; Either on the basis of the aforesaid finding of the High Court or upon a decision of a High Court, the Central Government may, not withstanding any other provisions contained in this Act, by order remove the delinquent respondent from his office. An order of removal having been passed under Section 388E. the person concerned will be debarred from holding the office for a period of five years from the date of the order of removal. This time-limit may, however, be relaxed by the Central Government with the previous concurrence of the High Court, and the Central Government may accordingly permit such person to hold the office of a director or any other office connected with the conduct and management of the affairs of the

[illegible] the expiry of the period of five years [illegible] termination of his office, he will be entitled to or be paid any compensation in any event, even if there is anything contained in any other provisions of this Act, or any other law or contract, memorandum or articles on his removal from the office. On the removal of the person the company may, with the previous approval of the Central Government, appoint another person to that office in accordance with the provisions of this Act. [Section 388E (3), (4) and (5)].

Sole Selling Agents : A company cannot *appoint* a sole selling agent for any area for a term exceeding 5 years at a time. But it can *re-appoint*, or *extend* the term of office by further period not exceeding 5 years on each occasion. The Board "shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made." It has been held that the appointment of a sole selling agent must be made subject to the condition of its being cancelled if not approved by the company in its general meeting ; and such a clause must be inserted as a mandatory condition in all appointments of sole selling agents ; an appointment without such a clause being inserted is void *ab initio* (*Arante Manufacturing Corporation v. Bright Bolts Private Ltd. 1967 Comp. Cas 759* : *Shelagram Jhaijharia v. National Co Ltd. 1965 Comp Cas, 706*. If the company in the general meeting disapproves the appointment, it shall become invalid from the date of the general meeting [*Section 294* (*2A*)].

Where a company has a sole selling agent, the Central Government may require the company to furnish to it such information regarding the terms and conditions of the appointment as it considers necessary for determining whether or not such terms and conditions are prejudicial to the interest of the company. If the company refuses or neglects to furnish any such information, the Central Government may appoint a suitable person to investigate and report on the terms and conditions contained in the appoinment of the sole selling agent. After perusal of the information furnished either by the company or by investigator (as the case may be), if the Central Government is of the opinion that the terms and conditions of the appointment are prejudicial to the interest of the company, it may make the necessary modifications therein so that they are no longer prejudicial to the interests of the company. The appointment of sole selling agent shall be regulated by the terms and conditions as varied by the Central Government from the date as may be specified by the Central Government (*Section 294* (*5*)] It has been provided that where the company has more selling agents than one, the Central Government may exercise similar powers referred to above—only for the purpose of determining whether any of those selling agents should be declared to be the sole selling agent, and if so, for which area or areas.

A company may have more selling agents than one in any area or areas. The Central Government may, if it reasonably feels so, ask the company for such information regarding the terms and conditions of appointment of all the selling agents as it considers necessary. The purpose for calling for such information is to

determine whether any of those selling agents should be declared to be the sole selling agent for such area or any of such areas. If the company refuses or neglects to furnish any such information, then the Central Government may appoint a suitable person to investigate and report on the terms and conditions of appointment of all the selling agents. On the basis of the information thus obtained directly or through the investigator, the Central Government may reasonably form an opinion that any of the selling agents is to all intents and purposes be the sole selling agents for such area. If it so forms an opinion, it may be order declare that selling agent to be the sole selling agent for that area with effect from such date as may be specified in the order. From the date so specified in the order, his appointment as the sole selling agent shall be regulated by the terms and conditions as varied by the Central Government [sub-section (6)].

It shall be the duty of the company (a) to produce to the person under clause (b) of sub-section (5) or clause (b) of sub-section (6). all books and papers of, or relating to, the company which are in its custody or power, and (b) otherwise to give to that person all assistance in connection with the invesigation which the company is reasonably able to give [sub-section (7)]. If the company refuses or neglects to perform these two duties, then the company and every officer thereof who is in default shall be punished with fine extending to Rs. 5,000 and with a further fine of not less than Rs. 50 for every day after the first during which such refusal or neglect continues [sub-section (8)].

Prohibition of payment of compensation to sole selling agents for the loss of office. Section 294A prohibits payment of compensation to the sole selling agent for the loss of his office in the following cases :

(i) Where the appointment of the sole selling agent ceases to be valid by virtue of Section 294 (2A) ;

(ii) where he resigns his office as a result of reconstruction or amalgamation of the company, and is appointed as the sole selling agent of the reconstructed company or the body corporate resulting from the amalgamation ;

(iii) where he resigns his office otherwise than in the circumstances envisaged in the foregoing caluse (ii) ;

(iv) where he has been guilty of fraud or breach of trust in relation to, or of gross negligence in the conduct of his duty as the sole selling agent ; and

(v) where he has instigated or taken part directly or indirectly in bringing about the termination of the sole selling agency.

The amount of compensation payable for the loss of office must in no case exceed the remuneration which he would have earned, had he been in office for the unexpired residue of his term, or for 3 years, whichever is shorter. The amount thereof is to be calculated on the basis of the average remuneration actually earned

[illegible] a period of 3 years immediately preceding the [illegible] ceased to be in office or his appointment was terminated. In case he had held the office for a period lesser than 3 years, the basis would be the average remuneration that he had earned during such shorter period.

Power of the Central Government to prohibit the appointment of sole selling agents in certain cases : Section 294AA inserted by the 1974 Amendment Act, has vested the Central Government with this power. It may be of the opinion that the demand of goods of any category – to be specified by that Government – substantially exceeds the production or supply of such goods and that the services of sole selling agents will not be necessary to create a market for such goods. If it actually forms this opinion, then it may, by notification in the Official Gazette, declare that the sole selling agents shall not be appointed by a company for the sale of such goods for such period as may be specified in the declaration [Sub-section (1)].

A company cannot appoint any individual, firm or body corporate who or which has a substantial interest in the company, as sole selling agent of that company, unless such appointment has been previously approved by the Central Government [Sub-section (2)].

If a company has a paid up share capital of Rs 50 lakhs or more, then it cannot appoint sole selling agents without the consent of the company given by a special resolution and the approval of the Central Government [Sub-section (1)].

Read the provisions of Se tion 294(5), (6) & (7) above and note that these provisions shall, so far as may be apply to the sole selling or the sole purchasing or buying agents of a company [sub-section (4)].

A company seeking approval under Section 294AA is required to furnish such particulars as may be prescribed [sub-section (5)].

It may so happen that an appointment has been made of a sole selling agent by a company before the commencement of the 1974 Amendment Act ; also that the appointment is such that it could not have been made except on the *authority* of a special resolution passed by the company and the *approval* of the Central Government if sub sections (2), (3) & (8), were in force at the time of such appointment. In such circumstances, the company shall obtain the aforesaid authority and approval within 5 months from such commencement. If it does not do so, then the appointment shall stand terminated on the expiry of 6 months from such commencement [sub-section (6)]. If the company in general meeting disapproves the appointment in sub-section (3), then such appointment shall cease to be effective notwithstanding anything contained in sub-section (6) [sub-section (7)].

All the provisions of Section 294AA but those of sub section (1) shall apply, so far as may be, to the appointment by a company of a sole selling agent for the buying or purchasing of goods on behalf of the company [sub-section (8)].

The explanation to Section 294AA explains the expression [illegible] and "substantial interest". *Appointment incl de re-appointment.*

In relation to an individual, "substantial interest" means the beneficial interest, held by such individual or any of his relatives singly or together, in the shares of the company, the aggregate amount paid up on which exceeds Rs. 5 lakhs or 5% of the paid-up share capital of the company, whichever is lesser.

In relation to a firm, a body corporate, "substantial interest" means the beneficial interest held by such individual or any of his relative signly or together, one or more partners of the firm or any relative of such partner singly or together, such body corporate or one or more of its directors or any relative of such director singly or together, in the shares of the company the aggregate amount paid up on which exceeds Rs. 5 lakhs or 5% of the paid-up share capital of the company, whichever is lesser.

Self-Examination Questions. (*Not to be an wered for evaluation. Answers to be found at the end of the Study paper*).

49. The directors of and insurance company left the management of the company's affairs almost entirely to B, the managing director. On account of B's fraud, a large quantity of the assets of the company disappeared. In the balance sheet items appeared under captions "loans at call or at short notice" and "cash at bank or hand'. But the directors never required how these items were made up. Had they done so, they would have discovered that the loans were chiefly made to B and to the company's general manager and that the "cash at bank or in hand" included £ 93,000 in the hands of the company's stock brokers, in which B was the partner. Could the directors be held culpably negligent in the circumstances? [*in re-City Equitable Fire Insurance Co. (1925) Ch. 407*].

50. The Directors left all the management of a bank's affairs in the hands of a manager and never cared to enquire whether the loans were made by the manager on securities or whether the securities were good or worthless. The manager advanced large amounts to his relatives and friends without security or on securities which were obviously fake, Decide [*Re : Union Bank of Allahabad Ltd.*]

51. The entire management of a cotton mill was vested in the manner. The balance sheet of the mill showed stocks of yarn. As a matter of fact the mill did not possess the stocks shown and the directors and never made any physical checking of yarn. The shareholders brought an action against the directors on ground of negligence. The directors contended that they could not be expected to keep a constant check on fluctuation in the stock of yarn ; the responsibility in this regard was that of the manager who was apparently an honest man. Would this contention of the directors be upheld (*In Kingston Cotton Mills Co.*)

52. "Where an agent is liable the directors would be liable; where the liability would attach to the principal only, the liability is a liability of the com-

pany" [*Ferguson v. Wilson (1866) per Lord Cairns*]. Apply this test to the following cases and state if the directors are liable :—

(a) Where the directors make themselves personally liable to a third party.

(b) Where the contract and the surrounding circumstances indicate that they are personally liable.

(c) Where the directors contract without purporting to bind the company.

(d) Where the directors say, "We the directors of X Co. Ltd. hereby agree...

53. How shall the remuneration payable to directors be determined ?

54. Can the remuneration payable to directors be determined at a meeting of the directors themselves ? [*Radhey Shyam v. The Official Liquidator A.I.R. 1968 Raj 226*].

55. The remuneration payable to directors :—

(a) shall be.

(b) shall not be, subject to the provisions of Sections 198 and 309.

56. The Explanation to Section 198 includes certain items within the purview of the word "remuneration". Can you account for this inclusion ?

57. What is the overall maximum limit of managerial remuneration ?

58. Does the said overall maximum limit include any fee payable to directors for attending the Board or its Committee meetings ?

59. What is the basis on which a managing or whole-time director may be paid his remuneration ?

60. Can the remuneration of directors of public company or its subsidiary be increased ?

61. (a) If any director gets any amount in excess of its statutory limit, can he be forced to return the excess amount to the company ?

(b) Can the company waive the recovery of any such sum ?

ANSWERS TO THE SELF-EXAMINATION QUESTIONS

1. Through human agency ; 2. Directors and Board of Directors respectively ; 3. Elected by shareholders ; 4. (a) Both ; (b) (i) & (ii) ; (c) (ii) ; (d) (i) ; (e) ; (ii) ; (f) (i) : 5. The a.. prescribes none-articles' prescription prevails ; 6. (a) 3 ; (b) 2 ; (c) 2 ; 7. (a) False ; (b) False ; (c) True ; (d) True ; (e) False ; (f) False ; (g) False ; (h) True ; (i) True ; (j) False ; (k) True ; (l) False ; 8. Meeting to stand adjourned for a week ; 9. Yes, subject to the exceptions in

S. 256 (4) (b) ; 10. (a) Ordinary resolution ; (b) Special resolution ; (c) No—necessary only in case of (b) ; 11. Yes, if the articles permit ; 12. No ; 13. No ; 14. No ; 15. No ; 16. Those mentioned in S. 274 ; 17. 20 companies only ; 18. (a) ; No ; (b) Yes ; 19. (a), No ; (b) Yes ; 20. No ; 21. Value of one share ; 22. Yes, in section 233 ; 23. Because the latter, being an employee. cannot give up office at his pleasure—his resignation must be approved or accepted ; 24. No, because articles operate as long as the company is a going concern ; 25. No, 26. No ; 27. No; unless so delegated ; 28. Yes; 29. No; 3. No; 30. (a) 3; (b) 4; (c) 2 ; (d) 2 non-interested directors ; 32. No; 33. Yes; 34. No ; 35. Those prescribed by Section 293, Section 294(3), 314, 370, 149 (2A) etc. ; 36. No ; 37. No, further resolution to be passed for delegation ; 38. Yes, only with the previous approval of the Central Government ; 39. Yes, if the private company is not a subsidiary of a public company ; 40. (a) At the first meeting of the Board held after the director becomes interested ; (b) At the Board's meeting at which the question of entering into it is first considered if interest has arisen by that time or at the first Board meeting after the arising of the interest ; 41. (a) No ; (b) No ; 42 (a) For the sale, purchase or supply of goods or services for underwriting shares or debentures ; (b) No ; 43. Voidable at Boad's option. 44. Yes, provided the Board has not repudiated the contract after the expiry of 3 months ; 45. Yes ; 46. Void ; 47. (a) Yes ; (b) No ; 48. (a) No ; (c) No ; (d) Yes ; (e) Yes ; 49. Yes ; 50. Directors liable for misfeasance could not be said to have acted reasonably and hence non-exonerable from their liability ; 51. Yes ; 52. Yes ; 53. Either by the articles or by a shareholders' resolution at a general meeting ; 54. Yes ; if there is a clear provision to that effect in the articles ; 55. (a) ; 56. To prevent directors from drawing more money than what they are statutorily entitled to, in the guise of collateral benefits. 57.11% ; 58. No ; 59. Monthly basis or fixed percentage—of net profits basis or in combination of both the bases ; 60. Yes, only with the approival of the Central Government ; 61. (a) Yes ; (b) No.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL

F. S. P. (N) Adv. CL—3

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FINAL COURSE (N)

COMPANY LAW

STUDY—III

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* Powers of the Court and the Central Government Regarding Oppression and Mismanagement

Prescribed Readings :

1. *Lectures on Company Law, 18th Edition by S. M. Shah.*
2. *Principles of Company Law, 1977 Edition, by M. C. Shukla and S. S. Gulshan.*
3. *Indian Company Law, Latest Edition by Avtar Singh.*

Restrictions on Loan to Companies under the Same Management *(Section 370)*

A leading company is not competent to advance a loan to any body corporate or to give any guarantee or to provide any security, in connection with a loan made by any other person to, or to any other person by any body corporate, unless the same has been previously authorised by a special resolution of the shareholders of the lending company. But no such special resolution is necessary if the aggregate of such loans to other bodies corporate not under the same management as the lending company does not exceed 10% of the aggregate of the subscribed capital and free reserves of the lending company.

However, the aggregate of all the loans made to all bodies corporate must not exceed without the prior approval of the Central Government :

(a) 30% of the aggregate of the subscribed capital of the lending company and its free reserves, where all such other bodies corporate are not under the same management as the lending company ; or

(b) 20% of the aggregate of the subscribed capital of the lending company and its free reserves, where all such other bodies corporate are under the same management as the lending company.

N B. The restrictions contained in the aforementioned two clauses are intended to operate alternatively :

Sub-section (IA) provides that when a lending company makes any loan or gives any guarantee or provides any security in connection with a loan made by any other person to a firm in which one of the partners is a body corporate under the same management as the lending company or the loan has been advanced by such a firm to another person on the security or guarantee provided by the lending company, such financial assistance shall be deemed to have been provided to a body corporate under the same management

When two bodies corporate are deemed to be under the same management :

The relevant conditions are contained in sub-section (IB). These are as follows :

(a) If the managing director or manager of one body corporate is managing director or manager of the other body ; or

(b) If a majority of the directors of one body constitutes, or at any time within the six months immediately preceding constituted a majority of the directors of the other body ; or

(c) If, at least, one-third of the total voting power with respect to any matter relating to each of the two bodies corporate is exercised or controlled by the same individual or body corporate ; or

(d) If the holding company of one body corporate is under the same management as the other body corporate ; or

(e) If one or more directors of one body corporate, while holding whether by themselves or together with their relatives, the majority of shares in that body corporate, also hold, whether by themselves or together with their relatives, the majority of shares in the other body corporate.

Maintenance of record : Every lending company must maintain a register showing the names of the bodies corporate that are under the same management as the lending company, the name of every firm in which a partner is a body corporate under the same management as the lending company as well as every loan made, guarantee given or security provided to different bodies corporate under the same management, as the lending company. The Register shall also contain particulars of every loan, guarantee or security. (sub-section (IC)

Further, the particulars of every such loan, guarantee or security must be recorded in the register within three days of the making of such a loan or the giving of such guarantee or the provision of such a security.

Heavy penalties have been prescribed for any failure to maintain such a record *viz*, fine extending up to Rs 500 and also a further fine extending up to Rs. 50 for every day after the first during which the default continues. The records must be kept at the registered office of the company and be available for inspection as and when required. Also, it should be permissible to take out extracts when required.

Exceptions : The aforementioned provisions are not applicable to the following :

(a) any loan made : (i) by a holding company to its subsidiary : (ii) by a banking company or an insurance company in the ordinary course of its business ; (iii) by a private company, unless it is a subsidiary of a public company ; or (iv) by a company established with the object of financing industrial enterprises :

(b) any guarantee given or any security provided ; (i) by a holding company in repect of any loan made to its subsidiary ; or (ii) by a banking company or an insurance company in the ordinary course of its business ; or (iii) by a private company unless it is a subsidiary of a public company ; or (iv) by a company established with the object of financing industrial enterprises [sub section (2)] ; and

(c) a book debt unless, in its inception, it is in the nature of a loan or an advance.

Purchase by a Company of Shares, etc, of other Companies in the Same Group : Section 372 provides that a company cannot subscribe for, or purchase, the shares of any other body corporate (whether by itself, or by any individual or association of individuals in trust for it or for its benefits or on its account) unless it complies with the restrictions and conditions specified in Section 372. The Board of Directors of such an investing company can invest in the shares of any other body corporate up to 10 per cent of the subscribed capital of such body corporate provided by so doing the aggregate of investments in all other bodies corporate (which are not in the same group) does not exceed *thirty per cent* of the subscribed capital of the investing company and the aggregate of the investments made in all other bodies corporate in the same group does not exceed *twenty per cent* of the subscribed capital of the investing company [Section 372 (2)]. Sub section (3) of Section 372 provides that in computing the percentages mentioned above, the aggregate of all the investments made by the investing company in other body or bodies corporate must be taken into account. Moreover, this limit is inapplicable to a company which has to invest in shares offered to it as rights shares in terms

of Section 81. In other words, investments in rights shares up to any amount irrespective of the aforesaid percentages is permissible. [First Proviso to sub section (4)]. But according to the second proviso to this sub-section in computing the above percentages for investing in other shares, investments made in rights shares are to be included.

An investment in excess of the aforementioned percentages can be made only after it has been sanctioned by resolution of the investing company in a general meeting, and further approved by the Central Government [sub section (4)].

Besides, an investment within the powers of the Board of Directors can be made only by a resolution passed at a meeting of the Board of the investing company with the consent of all the directors present at the meeting and entitled to vote thereat. The notice of the resolution to be moved must have been sent to every director in the usual manner specified in Section 286 [sub section (5)]. In this context, let us examine a problem. The directors of X Co. Ltd. desire to authorise its managing director to invest from time to time surplus funds in the purchase of shares of other companies. Would such an authorisation be valid ? Although Section 292 (as you have read in the preceding Study Paper) empowers the Board of Directors of a company, to delegate to the managing director the power to invest, in general terms, the funds of the company, nevertheless because of the overriding provisions of sub-section (5) of section 372, the, above mentioned authorisation would not be valid This is because Section 372 does not provide for such a delegation.

The investing company also must maintain a register of investments made by it in shares of any body corporate whether or not in the same group: disclosing its name, the date on which the investment was made, the date on which investing company came in the same group, the names of all the bodies corporate in the same group. The entries in the register must be made within 7 days of the investment having been made. The Register must be kept open to inspection at the registered office and extracts thereof be allowed to be made and copies thereof, when requisitioned, should be supplied on the same terms and conditions as in the case of Register of Members [sub-sections (6) & (7)]. If default is made in complying with the provisions of sub-section (6) or (7) the company and every officer of the company who is in default shall be punishable with fine extending to Rs. 500 and also with a further fine extending to Rs. 50 for every day after the first during which the default continues [sub-section (8)].

Furthermore, every investing company must annex to each balance sheet a statement showing the names of bodies corporate, indicating separately those in the same group, in which investments are held and the nature and extent of investments so made in each body corporate togather with particulars of investments made since the date of previous balance sheet. Such particulars are not required in the case of a company whose principle business is that of dealing in shares, stock, debentures or other securities [sub-section (10)]

A body corporate is deemed to be in the same group as the investing company if the body corporate and the investing company are situated in relation to each

other in any one of the manner described in sub-section (1B) of Section 370 [sub-section (1)]

The provisions of this Section are not applicable :

(a) to any banking or insurance company ;

(b) to a private company unless it is a subsidiary of a public company ;

(c) to any financing company established with the object of financing, whether by way of making loans or advances to or subscribing to the capital of private industrial enterprises in India. In any case, where the Central Government has made or agreed to make to the company a special advance for the purpose or has guaranteed or agreed to guarantee the payment of moneys borrowed by the company from any institution outside India ; and

(d) to investments by a holding company in its subsidiary [sub section (14)]

N.B. In exercise of the powers conferred by Section 620 (1), the Central Government hereby directs that Section 372 shall not apply to any company established with the object of financing, where a State Government has made, or agreed to make to the company a special advance for the purpose of making loans or advances to, or subscribing to the capital of, private industrial enterprises in India. (Notification No. GSR 990 dated 9.8.75).

Certain Companies to have Secretaries

The provisions in this regard have been incorporated in the Act anew by the 1974 Amendment Act and are contained in section 383 A. Every company which has a paid up share capital Rs. 25 lakhs or more, must have a wholetime secretary. If the Board of Directors of such a company comprises only two directors, then neither of them can be the secretary of the company [sub-section (1)].

If, at the commencement of the Companies (Amendment) Act, 1974, (i. e., February 1st 1975) any firm or body corporate is holding the office of secretary of a company, then it must vacate the said office, within 6 months from such commencement. Further, if any individual is holding this office at such commencement with more than one company having a paid-up share capital of Rs. 25 lakhs or more, then he must exercise his option as to the company of which he intends to continue as the secretary, within 6 months from such commencement ; also on and from such date, he must vacate office as secretary in relation to all other companies [sub-section (2)]. It may be noted that provisions of sub-section (2) are of historical importance only.

Compromise, Arrangement and Reconstruction

Though Companies Act defines "arrangement" it does not define "compromise". These terms have no definite legal connotation. 'Compromise' means an amicable agreement between parties to a controversy to settle their differences by making mutual concessions, as distinguished from adjudication on the basis of an exact ascertainment of the opposing rights. In a compromise, "the parties agree

not to try out to settle it between themselves by a give-and-take arrangement" (Stroud's Judical Dictionary). For the purpose of a compromise, it has been held that it is but essential that each party thereto should be empowered to make the necessary concessions. *(Danichand & Co. vs. Narain Das & Co.* (1947) 17 *Comp. Cas* 195 *F.B.*). Thus compromise envisages the existence of a dispute, e g., one relating to rights. But the word "arrangement" is of wide import and its meaning should not be limited to something analogous to a compromise.

Section 390 (b) provides that the expression 'arrangement' includes a reorganisation of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or by both these methods. An arragement also may involve debentureholders being given an extension of time for payment, releasing their security in whole or in part or exchanging their debentures for equity shares in a new company; the creditors agreeing to receive cash in part payment of the claims and the balance in shares or debentures of the company; preference shareholders giving up their rights to arrears of dividends, further agreeing to accept a reduced rate of dividend in the future etc.

Reorganisation or arrangement is said to have taken place only when one company is involved. Amalgamation, on the other hand, is of two or more companies. The term "reconstruction" includes reorganisation, arrangement. amalgamation, etc , and thus is a term of wide import.

A reconstruction is commonly said to have taken place when a company resolves to wind up its business and it is proposed to form a new company, with only the old shareholders as its members to take over its undertaking, the rights of sh reholders in the old company being satisfied by their being allotted shares in the new company. In that case, the old company ceases to exist in point of law, and its assets are transferred to the new company. It would be, nonetheless, a reconstruction even if all the assets might not pass to the company, or all the shareholders of the transferor company might not be shareholders in the transferee company, or all the liabilities of the transferor company might not be taken over by the transferee company. A reconstruction, in such a case, would imply that substantially the same business would be carried on substantially by the same persons *[Re South African Supply and Cold Storage Co.* (1904) 2 Ch. 286*]*.

A reconstruction may be necessary for the following purposes :

(1) **To Extend the Operations of the Company** : If the shares are fully paid up and further capital is desired to be raised, the shareholders in the old company may be issued only partly-paid shares in the new company so that by calling up the uncalled amount the company would have the funds it would require for carrying on its business.

(2) **As a Method for Altering the Memorandum of Association** : When such an alteration cannot by undertaken under Section 17. i.e., in a case where the

new company desires to have "objects", in its memorandum, over and above those in the old company.

Although the Companies Act permits companies to alter their objects by a special resolution, with the confirmation of the Company Law Board, it is not possible to radically alter the 'objects clause' of the Memorandum of Association, e.g., a company incorporated to manufacture rayon yarn cannot switch over to the business of manufacturing jams. It may, therefore, be necessary for a company to go into voluntary liquidation to carry on an activity totally unrelated to those for which it was originally formed.

(3) **For Purpose of Reorganisation**: The term "reorganisation" is usually applied to an arrangement to alter or modify the rights of shareholders or creditors, or both.

(4) **In Order to Amalgamate with one or more Companies**: Amalgamation is the blending of two or more companies into a single undertaking, the shareholders of each such company becoming substantially the shareholders in the new company which is to carry on the blended undertaking. To achieve this objective, either a new company may be formed to take over the business of the existing companies or the business of one or more existing companies be taken over by one of the existing companies.

(5) **Reconstructions or Arrangements Undertaken for Bringing the Capital Structure of Companies into Line With the Requirements of the Act**: The Act requires that the capital of a company must consist only of equity and preference shares. Companies having deferred or other forms of capital, therefore, are obliged to conform to the legal requirement as to their capital structure by a scheme of reconstruction.

Reconstruction may be carried out :

(a) by sale of the company under the powers contained in its Memorandum of Association ;

(b) by a scheme of arrangement under Section 391 ;

(c) by acquiring all or a majority of the shares in another company under Section 395 ;

(d) by a compulsory amalgamation of companies in the public interest by an order of the Central Government under Section 396 ;

(e) by a sale under section 494 (members voluntary winding up) ; or under Section 507 (creditor's voluntary winding up : in the former case a special resolution and in the latter case the sanction either of the Court or of the Committee of Inspection is necessary ;

(f) by a scheme of arrangement with creditors only ; under Section 517 (voluntary winding up both by members and creditors, a special resolution and consent of three-fourths in value of creditors are necessary.

(a) **Sales Under Powers in the Memorandum** : Where a company has power in the objects clause of memorandum, it may dispose of the whole of its undertaking to another company. After the sale, company will be wound up and the shares in the new company will be distributed among the members in proportion to their holdings in the old company. When a company is not in a position to raise further capital and it cannot otherwise carry on its business or when the carrying on of the business of the company is considered necessary, the company may resort to such a course.

'Sale of the whole undertaking and division of the proceeds cannot be a corporate object. Under its Memorandum of Association, a single steamship company may no doubt sell its only steamship with the whole of its equipment and with proceeds buy another. But under a clause in its Memorandum of Association it cannot, in my opinion, sell its only steamship and all its undertaking and divide the proceeds. Distribution of capital (except in reduction of capital, can only be made in a winding up ", [Buckley L. J., *in Bisgood vs. Henderson's Transvaal Estate.* (1908) I Ch. 743]. That is to say, it can only be effected in liquidation of the company under the powers conferred by section 287 of the English Companies Act which corresponds to Section 494 of our Companies Act.

(b) **Reconstruction under Section 391** : In order to facilitate a reconstruction or amalgamation, it is frequently desirable or necessary for the company first to effect a compromise or arrangement with its creditors or any class of them or/and members or any class of them Section 391 lays down the procedure by which the Court's assistance may be invoked in this respect. It must be noted that the meeting should be conducted in such a manner as the Court directs and that Section 170 (2) dealing with class meetings will not. apply to meetings held under Section 391. Section 391 applies also to a company which is being wound up. Where a company is not being wound up. provisions of the Act apply to such meeting unless the Court orders otherwise [Madras Companies Rules : RR 41, 45] Under the Calcutta High Court Rules, (RR. 41,55) notice of petition under Section 391 has to be given to members and creditors. They should send notice to the petition to the effect that they intend to appear on the hearing of the petition.

When a compromise or arrangement between parties aforesaid is proposed. the following persons may apply to the Court :

(i) the company ;
(ii) any creditor ;
(iii) any member ; or
(iv) in the case of company which is being wound up, the liquidator.

On such an application, the Court may order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs. If at the meeting, a majority in number representing three fourths in the value of the creditors or members (or any class of them), as the case may be, present and voting either in person or by proxy, where proxies are allowed under the Rules made under

Section 643, agree to any compromise or arrangement. It is, *if sanctioned by the* Court, binding on all the creditors or class of creditors or on the members or class of members, as the case may be. The compromise or arrangement is also binding on the company or, if the company is being wound up, on the liquidator and on the contributories (sub-section (2)].

But, before according the aforesaid sanction, the Court must satisfy itself that the company or any other person which or who has made the application, has disclosed to the Court by an affidavit or otherwise all the material facts relating to the company, *e.g.*, latest financial position of the company, the latest auditor's report on the account of the company, the pendency of any invistigation proceedings in relation to the company under Sections 235 to 251, etc. [Proviso to Section 391 (2)]

You have observed above that if the requisite three-fourths majority is obtained in favour of a scheme of reconstruction. the same shall bind the creditors, members, liquidators and contributories 'if sanctioned by the Court.'. This implies that the Court may not sanction, i.e. its power is *discretionary* and *not obligatory*. Moreover, under proviso to S. 391 (2), the Court is under an obligation not to sanction any compromise or arrangement under a full disclosure of all material fact relating to the company have been made This proviso is designed as a safeguard against any failure on the part of the company to disclose all the facts material to the scheme of the compromise placed for consideration of the shareholders or creditors. Therefore, the claim of the minority, on proof that directors had failed to disclose material facts regarding a company' financial position, would succeed and the Court would not accept the contention if there be any, that the scheme has been duly approved by the majority if it is satisfied that full disclosure of all material facts had not been made at the meeting convened by the Court under sub-section (1) of Section 391

An order of the Court, made as aforesaid shall not be effective until a certified copy of the same has been filed with the Registrar. A copy of the order is also required to be annexed to every copy of the memorandum or instrument which defines the constitution of the company issued after the certified copy of the order has been filed with Registrar ; in default thereof the company and any of its officers at fault shall be punished with fine. An appeal lies against the order under the Section to the Court empowered to hear appeals from the decisions of the original court, or if more than one court is empowered, to the Court of inferior jurisdiction. [Section 391 (3), (4), (5) & (7)].

Before giving its sanction, the Court must be satisfied that the statutory provisions have been complied with, that the class of creditors or members have been fairly represented by those who attended, and that the statutory majority in approving the scheme is acting *bona fide* in the interest of the class it professes to represent. The arrangement must also be such as a man of business would reasonably approve, as fair and reasonable as regards the different classes if any

Re. *Alabama, New Orleans, Texas and Pacific in Junction Rail Co, 1819. I Ch. 213 CA, Re Hindustan General Electric Corporation Ltd A. I. R. 1959 Cal 679; Nand Prasad vs. Arjun Prasad 1959 Pat (293).* The Court cannot sanction any scheme which involves the doing of an act which it *ultra vires* the company [*Re. Oceanic Steam Navigation Co. Ltd. (1939), Ch 4.*] But the memorandum can be changed if members consent. It should be noted that a scheme, not certified by the Reserve Bank, cannot be sanctioned by the Court in respect of banking companies. (See Section 45 of the Banking Regulation Act, 1949)

Powers of the Court : Apart from the power of sanctioning a compromise or arrangement the Court has *inter alia* the following powers :

(i) to stay, while application under Section 391 is pending, the commencement or continuation or any suit or proceeding against the company (Section 391 (6)] ;

(ii) to supervise the carrying out of the compromise or arrangement [Section 392 (1) (a)]. Only the High Court has this power when it makes an order under Section 391 ; a District Court has no such power. It may be noted that under Section 10 (2) (b), the Central Government can confer jurisdiction under section 391 on District Courts in respect of companies with a paid up capital of less than Rs. 1 lakh ;

(iii) to modify the compromise or arrangement for the proper working thereof [Section 392 (1)] ; and

(iv) to order winding up of the company, if it is satisfied that the compromise or arrangement is unworkable [Section 392 (2)].

It may be noted that only High Courts have powers (iii) and (iv).

Circulation of Information to Creditors or Members : Section 393 provides for the circulation of a statement which must explain the objects of the proposed compromise or arrangement scheme. The statement should accompany the notice of the meeting to be called to consider the scheme. It must set forth the terms of the compromise or arrangement and explain its effect. In particular, the statement must state any material interest of the directors, managing director or manager of the company whether in their capacity as such or as members or creditors and the effect on those interests, of the compromise or arrangement if and in so far as the effect is different from the effect thereof on the like interest of other persons. If the notice calling the meeting is given by an advertisement, a statement to the like effect must be included in it or it must state where and how a creditor or member entitled to attend the meeting, may obtain a copy of the statement. It must be furnished to such creditor or member free of charge on an application being made in the manner indicated in the notice. In the event of a default, the company and the officers responsible thereof would be liable to be penalised. It is the duty of every director, managing director, manager and trustee for debentureholders to serve notice on the company of such matters relating

to himself as may be necessary for the purpose of the Section ; a default is punishable with a fine.

Facilitating Reconstruction and Amalgamations :- In order to facilitate schemes of reconstruction & amalgamation when application is made to the Court under Section 391 for sanction of an arrangement which involves the transfer of the whole or part of the property of one company (called "transferor company") to another company (called "the transferee company), the Court may make an order under Section 394 dealing with the following matters :

(i) the transfer to the transferee company of the whole or part of the undertaking property or liabilities of any tranferor company :

(ii) the allotment or appropriation by the transferee company of any shares or debentures, policies, *etc.*, to or for any person ;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor company ;

(iv) the dissolution without winding up, of any transfer or company ;

(v) the provision to be made for persons who dissent from the scheme, and

(vi) any other incidental matter.

The first proviso to Section 394 (1) restrains the Cour from accepting a compromise or arrangement in connection with the scheme of amalgamation, before receiving a report from the Company Law Board or the Registrar that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or to pubtic interest.

Further under the second proviso, the order for the dissolution of the transferor company cannot be made until the official liquidator, on the scrutiny of the books and papers, has reported to the Court that the affairs of the company had not been conducted prejudicially to the interest of the members or to public interest.

N B *A 'transferor company' includes any body corporate, whether, or not a company under the Companies Act, while a 'transferee company' comprises only a company within the meaning of this Act. This distinction is presumably designed to facilitate transfer of foreign companies to Indian companies by schemes of reconstruction or amalgamation.*

Where, an order is made under Section 334. every company in relation to which the order is made must file a certified copy thereof with the Registrar for registration within 20 days after the order is made.

In the event of the whole or any part of the undertaking of the company being transferred, the directors cannot receive from the transferor company any compensation for loss of the office or by way of consideration for retirement. They may, however, receive such compensation from the transferee company or from any other person provided the particulars with respect to the payment proposed, have been disclosed to the members of the company and have been approved by them in general meeting (Section 319).

An order under Section 394 does not transfer automatically a contract of personal services which are in their nature incapable of being transferred, (previously existing between an individual and the transferor company) to the transferee company. *[Noxes vs. Doncaster Amalgamated Collieries Ltd., (1940)* 3 All. E.R, 549 (H L)].

Section 394A makes it obligatory on the part of the Court to serve notice of every application made to it under Section 391 or 394 upon the Central Government and to take into consideration the represantations, if any, made to it by the Government before passing any order under any of these Sections. The objective is to "enable the Government to study the proposal and to raise such objections thereto as it thinks fit in the light of the facts and information available with it, and also to place the Court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the Court before passing its order."

It may be noted that Section 394A, which provides for notice to the Central Government, does not apply to proceedings under Section 392 *[Mehtab Chand Golcha v:Official Liquidator, Golcha Properties (P). Ltd. (1981) 51 Comp. cas. 103 at p. 104]*.

(c) Aquisition or Amalgamation by Shars Purchase : Of the various methods of amalgamation, this is the simplest method. A company may acquire business and control of another company not by amalgamation but by acquisition of a majority of shares in that company. The consideration for acquisition may be paid either in cash or shares or both. Section 395 provides a means for the compulsory acquisition of the shares of a dissenting minority to prevent such a minority from extracting unreasonably high for its shares.

Under the aforesaid Section, a scheme of contract involving the transfer of shares or any class of shares in a company has first to be offered for approval of the holders of such shares by the company seeking to acquire the shares. The scheme or contract must then be approved by the holders of not less than 90% in value of the shares concerned within four months from the date of the offer (by the transferee company). Where however, such shares which are to be transferred are already held by the offeror (i.e transferee company) or its nominee or its subsidiary to a value greater than 10% of the aggregate of values of all the shares of the transferor company the terms of the offer must be the same for the holders of all other shares and the scheme or contract must not only be approved by 9/10th in value of such holders but they must also be not less than 3/4ths in number.

When these conditions have been setisfied, the transferee company may give notice in the prescribed manner to any dissenting shareholder, expressing its desire to acquire his shares. This notice, if decided to be given. must be served within 2 months after the expiry of the period of 4 months. If such notice is given, the transferee company is entitled and bound to acquire these shares on the terms approved by the majority, unless the dissenting shareholder applies to the Court

within one month from the date of the notice, and the Court orders otherwise.

But, if the transferee company has served the aforesaid notice upon the dissenting shareholders and they make no application to the Court or, if the application has been made, but the Court has not ordered to the contrary, the transferee company must within the prescribed period, send a copy of the notice to the transferor (i.e. offeral company together with an instrument of transfer executed by the transferee company and, on behalf of the shareholders, by a person appointed by the transferee campany. The transferee company must pay or transfer to the transferor company the amount or other consideration representing the price payable for the shares which the transferee company is entitled to acquire. The transferor company must thereupon register the transferee company as the holder of those shares, and within one month of the date of such registration, inform the dissenting shareholders of such registration and of the receipt of the money or other consideration representing the price payable to them by the transferee comp..ny [395(3)].

All sums of money and any other consideration received by the transferee company from the transferee company, are to be held in trust for the several persons entitled to the shares in respect of which they have been received and until disbursed, these are to be kept in a separate bank account. These are to be paid to the shareholders against the deposit of relevant share certificates. [Section 395 (4)].

In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company, the following provisions are applicable :

(1) Every such offer or every circular containing such offer or every recomendation to the member of the transferor company by its directors to accept offer must be accompanied by such information as may be prescribed.

(2) Every offer must contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that the necessary cash will be available.

(3) Every circular containing or recommending acceptance of such an offer should be first presented to the Registrar for registration and it should not be circularised until it has been registered.

(4) The Registrar may refuse to register any such circular which does not contain the information required to be given under paragraph (1) above or which sets out such information in a manner likely to give a false impression.

(5) Against an order of the Registrar refusing to register any such circular an appeal lies to the Court.

(6) Whosoever issues a circular mentioned in paragraph (3) above, which has not been registered, shall be punishable with fine extending to Rs 500 (Section 395 (4A)].

Further, to safeguard the interest of dissenting shareholders, sub-section (3) of Section 395 imposes an obligation on the transferor company to advise the shareholders, whose shares have been taken over, as to the price payable to them

within one month of the date of registration of the shares in favour of the transferee company, and of the receipt of the amount or other consideration representing the price.

When all the shares of the company have been agreed to be transferred, the director's qualification share will not be transferred till new directors, properly qualified to act as directors, have been appointed [*Briess vs Wolley* (1954) 2. W.L.K. 832 ; (1954 I.A I.R 909]. The directors of the transferor company cannot receive compensation for the loss of office or as consideration for retirement from office or in connection with retirement from the transferor company. But they may receive it from the transferee company or any other person if the particulars of the payments, proposed to be made, are stated in the notice of the offer sent to the shareholders of the transferor company and the proposal is approved by the company in general meeting (Section 320)

It may be noted that payments received by directors in contravention of Section 319 and 320 are to be held in trust by them for the company.

Power of the Central Govt. to Provide for Amalgamation of Companies in the Public Interest : Section 396 provides that where in the "Public" interest. it appears to the Central Government that amalgamation of the two companies is essential, it may, through notification in the Official Gazette, provide for the amalgamation of the two companies into single company with such constitution, property, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the notification. Incidental, consequential and supplemental provisions necessary to give effect to the amalgamation may also be included therein.

Every member of creditor (including a debentureholder) of each of the companies before the amalgamation shall have, as nearly as may be, the same interests in and rights against the amalgamated company as he had in the company of which he was originally a member or creditor. If his interests in or rights against the amalgamated company are less than his original interests etc in the original company, he shall be entitled or receive a compensation from the amalgamated company to the extent these have been reduced.

The amount of compensation receivable would be assessed by the prescribed authority.

But the Central Government would not make such an order for amalgamation unless :

(i) the draft copy of the proposed order has been sent to each of the companies concerned ; and

(ii) the Central Government has considered the suggestions, objections or modification to the same made by the said companies or any class of shareholders thereof or any creditor or class of creditors thereof, within a period fixed by the Central Government

The expression "public interest" has not been defined either by this Act, or by the General Clauses Act. It is a very wide expression and comprehends *inter alia*, (i) economic welfare of the community [*Shri Kishan vs. State of Rajasthan 1955. 2 SCR 531*; (ii) welfare of laboured (*Basti Sugar mills vs. Ram Ujagar A.I R (1964) S C. 355*].

Preservation of Books and Papers of Amalgamated Company (Section 396 A) : The books and papers of a company which has been amalgamated with or whose shares have been acquired by another company under Chapter V of part VI cannot be disposed of without the prior permission of the Central Government, Before granting such permission, the Central Government may appoint a person to examine the books and papers in order to ascertain whether they contain any evidence of commission of an offence in connection with promotion or formation or the management of the affairs of the first-mentioned company or its amalgamation or the acquisition of its shares.

It is a measure introduced to prevent accounts and records of a company being disposed of following amalgamation with a view to destroying an incriminating evidence.

Amalgamation of two Companies steps to be taken by both :

Procedures for Amalgamation of the Companies : Proceedings for amalgamation by the transferor and transferee companies should be carried out simultaneously. These are as follows :

In the Transferee Company	In the Transferor Company
1. To check up whether the memorandum contains the power of amalgamation; if not, then to carry out the proceedings for its alteration and to obtain Company Law Board's Confirmation.	1. The same as in the Case of transferee Company.
2. To prapare the draft scheme including exchange ratio and get it approved by the Board meeting.	2. —do—
3. To apply to the Court for directions to convene the general meeting by way of Judge's Summons [Rule 67 of the Companies (Court) Rules, 1959]; such directions would be in respect of matters set out in Rule 69.	3. —do—
4. To send notice for general meeting to every member along with a statement setting forth the terms of the compromise or arrangement and explaining its effect and particularly stating any material interests	4. —do—

of the directors, managing director or manager, whether in their capacity as such or as members or creditor, or otherwise and the effect on those interests of the amalgamation and insofar as it is different from the effect on the like interests, of other persons [Section 393 (1) (a)]. In case of the said notice being given through advertisement, then to either include the aforesaid statement or to notify the place for obtaining the copies of such statement [Section 393 (1) (b)]; these can be obtained free of charge on making an application therefor in the manner indicated in the notice [Section 393 (3)]. In case of debenture-holders' rights being affected by amalgamation, the said statement to give like information and explanation regarding the trustees under the deed [Section 393 (2)]

Rules 69 to 76 of the Companies (Court) Rules to be noted in this connection.

5. To hold the general meeting and pass the resolution approving the draft scheme of amalgamation subject to the confirmation of the High Court the resolution to be passed by a majority in number representing 3/4ths in value of the members as required by Section 391.

5. The same as in the case of transferee company

6. To move the High Court for approval of the scheme, and for the purpose to supply it with material facts as required by the proviso to Section 391 (2).

6. To move the High Court jointly with the transferee company, and also to supply the Court with all material facts.

Further the Court would need a satisfactory report from the Company Law Board or the Registrar that the affairs of the Company have not been conducted in a manner prejudicial to the interests of its members or

	to public interest, because it is a scheme for the amalgamation of it, which is being wound up, with the transferee company. [Proviso to Section 394 (1)]
7. On receipt of the Court's order, to file the certified copy thereof with the Registrar within 30 days after the making of the order [Section 394 (3)]; otherwise it would not be effective.	7. The same as in the case of the transferee company.
8. A copy of the Court's order also to be annexed to every copy of the memorandum or instrument which defines the constitution of the company issued after the certified copy of the order has been filed with the Registrar under a pain of penalty [Section 39 (4)].	8. The same as in the case of transferee company.
9 To proceed to effect the scheme of amalgamation as per the scheme approved and the directions given by the High Court by issuing suitable notices to shareholders and persons concerned and to allot shares and take over the business as per the scheme.	9. To do the same in the case of the transferee company, except of allotment of shares and taking over business, because no question of these arises in this case.

SELF-EXAMINATION QUESTIONS

(Answers not to be written out They may be seen at the end of the Study paper)

1. Will the companies mentioned hereunder be deemed to be under the same management?

(a) When the manager of A & Co. Ltd. is also the manager of B & Co. Ltd.

(b) When 6 out of 13 directors of A & Co. Ltd. are also the directors of B & Co. Ltd. which has 10 directors including the 6 of A & Co. Ltd.

(c) When 6 out of 10 directors of A & Co. Ltd. are also the directors of B & Co. Ltd. which has 10 directors including the 6 of A & Co Ltd.

(d) When 1/4th of the total voting power in respect of any matter relating to each of the aforesaid companies is exercised and controlled by the same individuals.

(e) When one director of A & Co. Ltd. holding the majority of its shares also holds the majority of shares in B & Co. Ltd.

2. Of the proposition comprised the following statements, one is correct. State wh ch.

(a) Ii is permissible for a public limited company to advance loan to any body corporate not under the same management as the lending company. (i) without any resolution ; (ii) through an ordinary resolution ; (iii) through a special resolution, of the shareholders of the lending company.

(b) It is (i) so permissible (ii) not so permissible, for a private company too to advance loan.

(c) Special resolution of the lending company (i) is necessary (ii) is not necessary, if the amount of the loan advanced to bodies corporate (not under the same management) is 10% or less in aggregate of subscribed capital and free reserves of the lending company.

(d) Prior approval of the Central Government will be needed if the aggregate amount of loan advanced to other bodies corporate (not under the same management) (i) are 10%, (ii) 20%, (iii) are 30%, (iv) are above 30%, of the subscribed capital and the reserves of the lending campany.

(e) Special resolution of the lending company (i) shall be required, (ii) shall not be required, if the loan advanced to a body corporate or to all the bodies corporate together is 5% or less in the aggregate of the subscribed capital and free reserves of the lending company, assuming that the recipient or recipients of the loan are under the same management as the lending company.

(f) If the loan, advanced by the lending company to other bodies corporate (which are under the same management as the lending company) is an the aggregate (i) 5%, (ii) 11%, (iii) 15%, (iv) 20%, (v) 25% of the subscribed capital and free reserves of all the lending company, then only the prior approval of the Central Government will be necessary.

3. Suppose, A & Co. Ltd. marks a loan to a firm, and B & Co. (P) Ltd. which is under the same management as A & Co. Ltd. is a partner in the said loaned firm. In the circumstances, can the amount of loan be deemed to have been made to company under the same management ?

4. (a) Is it essential for the lending company to maintain register and record therein, the requisite particulars in respect of the loan, etc. and the loarees under the same management as the lending company ?

(b) Is there any time limit for such recording of the particulars ?

(c) How can the compliance with these provisions be ensured ?

(d) Can this register be inspected by a number of the company and if so, where ?

5. Examine the following case ;

(a) A & Co. Ltd. makes a loan to B & Co. (P) Ltd., which is the subsidiary of A & Co. Ltd.

(b) A banking company or an insurance company makes a loan, in the ordinary course of its business,

(c) A company which is established with the object of financing industrial enterprises, advance loans to such enterprises.

The aforesaid companies made the loans beyond the statutory limits without obtaining the approval of the shareholders by special resolutions or of the Central Government wherever, it was necessary. Can these lending companies be penalised for violation of Section 390 (1) to (1E) ?

(6) State which of the propositions comprised in the following statements is correct.

(a) The Board of Directors of an investing company: can invest in the shares of any other body corporate which is not under the same management as the investing company; (ii) cannot invest in the shares of the other body corporate which is under the same management.

(b) It can invest in the shares of another body corporate (not under the same management group) (i) 10% of the subscribed capital of the investing company; (ii) 10% of the subscribed capital and free reserves of the investing company; (iii) 15% of the subscribed capital and free reserves of the other body corporate; (iv) 10% of the subscribed capital of such body corporate.

(c) The aggregate of the investments in all other bodies corporate (not in the same group) should not exceed (i) 30% of the subscribed capital of all the bodies corporate together; (ii) 30% of the subscribed capital of the investing company.

(d) The aggregate of the investments in all other bodies corporate (in the same group) must not exceed (i) 25% of the subscribed capital of the investing company; (ii) 20% of its subscribed capital; (iii) 15% of its subscribed capital.

(e) The aggregate to the investments in excess of 30% or, as the case may be, 20%; (i) needs only the sanction by a special resolution passed in a general meeting of the investing company; (ii) needs only the sanction by an ordinary resolution passed in a general meeting of the investing company; (iii) needs the sanction of the general meeting by an ordinary resolution and also of the Central Government; (iv) needs the sanction of the general meeting by a special resolution and also of the Central Government.

(f) The investment within the powers of the Board of Directors can be made at its meeting (i) passed by simple majority; (ii) passad by 3/4th majority; (iii) passed unanimously.

(g) The investing company; (i) may; (ii) may not (iii) must maintain a register of the above-mentioned investments.

(h) The entries in the aforesaid register must be made; (i) within 7 days; (ii) within 14 days; (iii) within 21 days from the date of investment.

(i) The said register (i) is not, (ii) is open to inspection.

7. How will you describe (whether as compromise or as arrangement or as reconstruction) the following situations.

(a) When the parties to a controversy amicably agree not to try their differences out, but to settle them between themselves on give-and-take basis.

(b) When there exists no dispute, but nonetheless an adjustment of rights or liabilities of members of creditors is proposed,

(c) When a company resolves to wind up its business and it is proposed to form a new company with only the old shareholders as its member to take over its undertaking.

8. Where a company has power in the objects clause of its memorandum it may dispose of the whole of its undertaking to another company.

9. Can a compromise or arrangement be proposed between a company and a class of its creditors or members ?

(a) Can a shipping company with only one steamship, under a clause in its memorandum, sell it with the whole of its equipment and with the proceeds buy another ship ?

(b) Can the said company, under a clause in its memorandum, sell the ship and all its undertaking and divide the proceeds amongst its shareholders ?

10. (a) Is it necessary to apply to the Court for the above-mentioned proposed compromise or arrangement ?

(b) Who can apply therefore when the company is a going concern ?

(c) Can the liquidator do so, when the company goes into liquidation ?

11. Suppose, in the said creditors' meeting convened by the Court a numerical majority agrees to the arrangement which is also sanctioned by the Court. Will it be binding on all the creditors ?

12. Before sanctioning the agreement, the Court (a) may, (b) may not (c) must, satisfy itself that the applicant has disclosed to the Court all the material facts relating to the company. Which is correct ?

13. The disclosure of all the Material facts (a) need be, (b) need not be, by an affidavit. State the correct position.

14. Does the fact that any investigation proceedings relating to the company under Sections 235-251 are pending, constitute a material fact for disclosure as aforesaid ?

15. The Court's order sanctioning the compromise or arrangement becomes effective as soon as it passes the order, Is it the correct exposition of law ?

16. An appeal (a) does lie, (b) does not lie against the order of the Court under Section 391. Which is correct ?

17. In the matter of sanctioning the scheme of arrangement, say whether the following statements are correct :

(a) The Court must be satisfied that the statutory provisions have been complied with.

(b) It is not necessary for it to see that the members or creditors (as the case may be) have been fairly represented by those who attended the meeting.

(c) The Court is bound to see that the statutory majority approves the scheme, but it is not bound to see that the statutory majority was acting *bona fide* in the interest of the members or the creditors (as the case may be).

(d) The Court can sanction a scheme even if it involves the doing of an act which is *ultra vires* the company.

(e) While the application for compromise or arrangement is pending with the Court, it can stay the commencement or continuation of any suit against the company.

(f) A District Court can supervise the carrying out of the compromise or arrangement.

18. Suppose, the compromise or the arrangement is found to be unworkable. What should the Court do in the circumstances ?

19. Suppose, that an application has been made to the Court under Section 391 for the sanction of an arrangement and that the arrangement involves the reconstruction and amalgamation and the transfer of the whole or the part of the property or liabilities of one company to another company : (a) Can the Court accord the sanction ? (b) When ?

20. In the circumstances, mentioned in Q. 19, the Act empowers the Court to make provision for the dissolution of the transferor company. Is this power of the Court absolute or contingent ?

21. Can the directors, on reconstruction and amalgamation of the transferor company, claim compensation from it for the loss of office ?

22. Can the aforesaid directors in the like circumstances claim compensation from the transferee company ?

23. Of the propositions comprised in following statements, state which is correct :

(a) A company (i) can, (ii) cannot, acquire the business and control of another company by the acquisition of shares in that other company.

(b) The scheme of the acquisition offered by the transferee company to the transferor company requires approval (i) by the holders of at least 75% in value of shares concerned (ii) by the holders of not less than 90% in value of the shares concerned.

(c) The above-mentioned approval of the shareholders may be accorded within (i) 30 days, (ii) 60 days, (iii) one month, (iv) 2 months, (v) 120 days, (vi) 4months. from the date of offer for acquisition.

24. It is said that in the matter of acquisition of shares as afore-mentioned

9/10ths in value of the shareholders of the transferor company must approve the transferee company's proposed acquisition. Now suppose, the transferee company already holds shares in the transferor company to a value greater than 1/10th of aggregate values of all the shares concerned :

(a) How would you compute the aforesaid 9/10ths for the purpose of approval ?

(b) In such a situation, will the approval by the shareholders holding 9/10ths in value of the shares be sufficient ?

(c) Will your answer be different, if more than 1/10th of the aggregate value of all the shares in the transferor company is held not by the transferee company but by its nominee or its subsidiary ?

25. If the statutory majority approves the scheme of acquisition offered by the transferee company :

(a) Can the latter acquire the shares of the dissentient minority ?

(b) Has the dissentient minority any right of appeal against the majority decision ?

(c) If so with whom and within what period ?

26. Which of the following statements are correct :

(a) When the dissenting shareholder does not appeal to the Court, or when he appeals to the Court, the Court does not order to the contrary then a deed of transfer executed by the transferor company on dissentient shareholders' behalf and by the transferee company.

(b) The transferee company is required to pay or transfer to the transferor company the amount or other consideration representing the price payable for the shares.

(c) The transferor company must first inform the dissenting shareholders of the receipt either of the money or of other consideration representing the price payable and thereafter register the transferee company as the holder of those shares.

(d) The registration must precede the act of information as aforesaid because the dissentient shareholders must also be informed of the registration by the transferor company.

(e) Till disbursement the transferor company is a trustee of all the money or any other consideration received from the transferee company for the person entitled to the shares.

(f) Till disbursement the transferor company must keep all the above-mentioned money or any consideration representing the price payble in its strong room

(g) The shareholders must be paid the aforesaid sums of money against the deposit of relevant share certificate.

27. There are two public limited companies. It is felt that these should be amalgamated into a single company in the interest of the public. Who is to decide the question of public interest and order for their amalgamation ?

28. The aforesaid order of amalgamation (a) need not ensure, (b) must ensure, that the interests and rights of the members and creditors in or against the new company on amalgamation will, as for as practicable, remain *status quo ante*, Which is correct ?

29. Can the Central Government straightaway order without parliamentary approval the amalgamation of two or more companies on ground of public interest ?

30. Can the book and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under Chapter V of part VI, be destroyed ?

(e) **Reconstruction under Section 494** : The Section gives complete *power* a special type for *sale of business in winding up* A company which is proposed to be, or is in the course of being wound up. voluntarily, may sell its business to another company and the compensation received, whether in the form of shares, policies or other like interest in the transferee company may be distributed among the shareholders of the company that is being wound up, or the members of the transferor company may receive any other benefit from transferee company. To give effect to it the following conditions must exist :

(i) the transferor company should be in process of being wound up as a members' voluntary winding up;

(ii) there should be a proposal to transfer or sell the whole or part of its business or property to another company (i e., the transferee company); and

(iii) the transferor company should approve, by a special resolution, the proposal to confer authority, whether general or particular, on the liquidator to put the above scheme or arrangement into effect.

The liquidator usually gives notice to the shareholders of the transferor company as regards the number of shares to which they are entitled, the amount payable by them thereon and the time within which they must apply for the shares. The sale or arrangement under this provision is binding on all the members whether they agree to it or not. If any member does not vote in favour of the special resolution, he may address to the liquidator his dissent in writing seven days subsequent to the passing of the special resolution and require him :-

(a) to abstain from carrying the resolution into effect ; or

(b) to purchase his interest at a price to be determined by agreement or arbitration in the manner provided by Section 494.

The liquidator has the right to exe. :ise either of the above options. Should he elect to purchase, he must raise the money in such a manner as determined by the company. It must be paid prior to the company being dissolved.

It is a common practice to make a provision in the scheme, enabling the liquidator to sell the shares of those who neither agree nor apply within the prescribed time and to distribute the sale proceeds among them.

The transferor company may pass such a special resolution either before or concurrently with the resolution for voluntary winding up or for the appointment of a liquidator. After an order for winding up of the company by or subject to the supervision of the Court has been passed within a year, the special resolution would not be valid unless sanctioned by the Court.

Arbitration, under this Section for determining the purchase price of shares of the dissentient member, will be governed by the Arbitration Act, 1940

Section 494 makes no provision as regard the rights of creditors who felt that they have been affected by the scheme of transfer. As such, the only remedy available to them is to present a petition either for compulsory winding up or for winding up under the supervision of the Court within a year of the making of the order.

The impact of Section 494 on the sale of the whole or part of the business or property is that a sale under such scheme can be made even to a foreign company.

Under Section 507, it is provided that the procedure under Section 494 would apply to a creditors' voluntary winding up as well as to a members' voluntary winding up. The liquidator in the former case will have to exercise the power only with the sanction of the Court or that of the Committee of Inspection.

At times an existing company may require further capital to make up the deficiency caused by losses or otherwise but the usual methods of raising capital may not be available to it. In such a case, it may resort to reconstruction under Section 494 by constituting a new company to take over the undertaking. The members of the existing company will be allotted partly paid shares in the nwe company in lieu of assets transferred. Fresh capital afterwards will be raised by calling the unpaid amount of the shares. The shareholders of the existing company, however will not be bound to take the partly paid shares and they may not assent to the scheme ; they may call for the purchase of their interest or for giving up the scheme. The shareholders concurring in the scheme, however, shall have to pay whenever the call is made for raising further capital.

(f) Reconstructions under Section 517 : It is another form of reconstruction pursuant to an arrangement with the creditors when the company is being voluntarily wound up 'Under this Section, any arrangement entered into between a company about to be wound up or in the course of winding-up and its creditors is binding on the company and its creditors provided it has been :

(a) approved by a special resolution of the company : and

(b) agreed to by three fourths in number and value of the creditors.

Any creditor or contributory may, however, within three weeks from the completion of arrangement, appeal to the Court and the Court may amend, vary, confirm or set aside the arrangement.

N. B. *Students may note that reconstruction under Section 517 is not commonly resorted to inasmuch as it might be difficult to secure the 3/4ths majority referred to in paragraph (b) above.*

Compensation for Loss of Office on Amalgamation or Reconstruction : Section 318 (3) of the Act prohibits the payment of compensation to a managing director, or other director for the loss of office when he resigns his office in consequence of the reconstruction of the company or its amalgamation and he is appointed as a managing director, manager or other office of the reconstructed or amalgamated company.

Provisions Prohibiting Reconstruction or Amalgamation are Void : Any provision contained in a document, (e.g., memorandum or aticles of associations ; resolution of the Board of Directors or the company in general meeting ; deed of agreement between the company and another person), which prohibits, or has the effect of prohibiting, reconstruction of the company or its amalgamation with any other company absolutely or on the condition that the managing, director or, manager, will be appointed to such an office of the reconstructed or amalgamation company, is void (Section 376).

SELF - EXAMINATION QUESTIONS

(Not to be answered. Answers may be seen at the end of the Study Paper.)

31. You have noticed that arrangement, reconstruction or amalgamation is possible in the case of a going company. Is reconstruction also possible of a company which is in the process of being wound up voluntarily ?

32. A company is proposed to be completely wound up as a members' voluntary winding-up. There is a proposal to transfer or sell part of its business or property to another company. The transferor company approves by an ordinary resolution of the proposal to confer authority on the liquidator to put the scheme into effect. Can the liquidator do so in the circumstances ?

33. In the case of members' voluntary winding-up, how is the authority to sell the business or property to another company given to the liquidator ?

34, Do you find any distinction between reconstruction or amalgamation under Sections 391 to 395 and reconstruction of amalgamation under Section 494 or 517 ?

35. Are the following statements correct ?

(a) Any arrangement entered into between a company about to be wound up or in the course of winding up and its creditors (under Section 517) is binding on it and its creditors only if it is approved by an ordinary resolution.

(b) It is so binding only if it is approved by a special resolution.

(c) It is binding only if it is agreed to by 3, 4 this in number of the creditors.

(d) It is binding only if it is agreed to by 3/4ths in number and value of the creditors.

(e) It is binding if it is both approved by an ordinary resolution and agreed to by 3/4ths in number of the creditors.

(f) It is binding if it is both approved by a special resolution and agreed to by 3/4ths in value of the creditors.

(g) It is binding if it is both approved by a special resolution and agreed to by 3/4ths in number and value of the creditors.

"Majority Rule" as applied in the management of a company : The Companies Act, 1956, together with the protection granted to minority under the Common Law, attempts to maintain a balance between the rights of majority and the minority shareholderes by admitting in the rule of the majority but limiting it at the same time by a number of well-defined minority rights, and thus protecting the minority shareholders,

Minority shareholders are protected by—

1 the Common Law ; and

2 the provisions of the Companies Act, 1956.

1. **Protection at Common Law :** It is a well-known principle, enunciated in **Foss v Harbottle,** that the rule of majority shall prevail. Butthere are certain exceptions to this rule where the majority rule does not prevail. These are as under :

(a) Where the act complained of is illegal or **ultra vires** the company :

(b) Where the act done by the majority constitutes a fraud on the majority ;

(c) Where a resolution is passed by a simple majority for any act which requires a special resolution for it to be effective ;

(d) Where the act infringes the personal rights of an individual member ;

(e) Where any act amounts to oppression of minority or mismanagement of the affairs of the company.

In all these cases a minority shareholder is entitled to bring an action for a declaration that the resolution complained of is void, or for an injuction to restrain the company from passing it. All these principles have been followed in a few leading cases in India as well.

2. **Protection under the Companies Act, 1956 :** Various rights are given to minority shareholders by the Companies Act, 1956. These relate to :

(a) The variation of class rights (Section 107).

(b) Schemes of reconstruction and amalgamation (Section 391).

(c) Prevention of oppression of minority and of mismanagement under Sections 397 and 398.

(d) The rights to apply to the Central Government to have the affairs of the company investigated. (Section 235).

There are some other Sections of the Companies Act which protect the minority shareholders' rights. These are :

1. S- 17 : Consent of the Company Law Board is necessary before certain acts can be validly done by a company, e.g., an alteration of the objects of a company.

2. S-101 : Consent of the Court is necessary in case of reduction of share capital.

3. S-111 : Right to appeal to the Central Government against the arbitrary action of the Board of Directors in refusing to register a transfer of shares.

4. S-408 : Right to apply to the Central Government (by a specified number of members) for the appointment of such number of persons as directors of the company to look after the interest of oppressed minority.

5. S-439 : A contributory is entitled to present a petition to the Court for the winding up of the company on the 'just and equitable' ground.

6. S-517 : An arrangement between a company and its creditors may be amended, varied, confirmed or set aside by the Court on the application of any creditor or contributory.

Prevention of Oppression and Mismanagement :

The management of companies is based on the principle of majority rule. Ordinarily, decision of the majority is the rule for the minority. This sound principle has, occasionally, been abused and the whip of the majority has often produced sullen effects, prejudicial to the best interests of the shareholders. Until the commencement of the Companies Act, 1956 the only remedy available (under the Indian Companies Act, 1913) to an oppressed minority was to petition to the Court to wind up the company on the ground that it was "just and equitable" so to do. The winding up remedy is however, not always advantageous to the petitioning shareholder, or shareholders because the very persons whose conduct is complained of, may be the only persons capable of buying up the shares of the dissentients Nevertheless, the oppression or mis-management calls for some remedial action. Sections 397 to 4 9 of the Companies Act, 1956 empower (i) the Court and (ii) the Central Government to deal with such situations.

The powers vested in the Court are contained in Sections 397 to 407 and those vested in the Central Government are contained in Sections 408 and 409.

Section 397 provides that any members of a company who complain that the affairs of the company are being conducted in a manner *oppressive to any member or members* may apply to the Court for appropriate relief subject to Section 399. Under Section 398, too, any members of a company may apply to the Court for appropriate relief on the ground that the affairs of the company are being conducted in a manner prejudicial to the interest of the company as a whole, subject to Section 399. Section 399 provides, however, that a single member is not entitled to make an application under either of the Section, viz., Sections 397 and 398.

Who may Apply to the Court when Oppression or Mismanagement is Complained of :

The application can be made only by :

(a) In the case of a company having a share capital ;

(i) not less than one hundred members or not less than one tenth of the total number of members, whichever, is less ; or

(ii) a member or members holding not less than one-tenth of the issued share capital of the company provided that the applicants have paid all calls and other sums due on their respective shares [Section 399 (1) (a)]. It may be noted that joint members are counted as one member.

(b) In the case of a company not having a share capital : not less than one-fifth of the total number of members [Section 399 (1) (b)].

(c) The Central Government : The Central Government can also apply or authorise a member or members to make an application under Section 397 or 398, though the requisite conditions under [a] and [b] are not satisfied [Section 399 (4)].

An application under Section 399 (4) must contain the names and addresses of the applicants, the total number of applicants. etc. It must be verified by an affidavit The Central Government may require the applicant to produce documentary evidence in support of the complaint [Section 399 (4) ; Rule 13 af the Companies (Central Govt's) General Rules and Forms, 1956]. It may also require the members to give security for costs [Section 399 (5)].

Difference Between Section 397 and Section 398 : Under Section 397, the existence of conditions justifying the making of a winding up order on the ground that it is just and equitable that the company should be wound up, is a condition precedent to the interference by the Court. On the other hand, under Section 398, a Court would interfere on its being satisfied that by reason of any material changes in the management or control of the company, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interest of the company. The two positions are distinct. Whereas in the first case, the Court acts to prevent injustice being done to a member or members in his or their individual capacity, in the second case the Court acts in order to prevent injury being inflicted to the intererest of the company as a whole.

Thus on an application made in the foregoing circumstances, the Court will interfere only if it is of the opinion—

(I) When it is made under Section 397 : (a) that the company's affairs are being conducted in a manner oppressive to any member or members [Section 397 (2)] or in a manner prejudicial to public interest ; and (b) that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding up order on "just and equitable" ground ;

(II) when it is made under Section 398 :—

(a) that affairs of the company are being conducted in a manner prejudicial to the public interest or in a manner prejudicial to the interests of the company [Section 398 (1) (a)] ; or

(b) that a material change has taken place in the management or control of the company may be conducted in a manner prejudicial to the public

interest or in a manner prejudicial to the interests of the company [Section 398 (1) (b)].

The Court may take such order as it thinks fit with a view to bringing an to end. or preventing the matters complained of or apprehended, as the case may be. The material change in the management or control contemplated in the preceding paragraph will be deemed to have taken place in any of the following circumstances viz :—

(i) when there has been alteration in the Board of Directors ;

(ii) when an alteration of its manager has taken place :

(iii) when a change has occurred in the ownership of the shares of the company :

(iv) when there has been a change in the membership of a company having no share capital ;

(v) when a change has taken place in any other manner whatsoever ;

(vi) by reason of any of the aforesaid changes, the affairs of the company are likely to be conducted in a manner prejudicial to public interest or to the interests of the company [Section 398 (1) (b)].

(III) Under Section 397, the Court can *end* the oppression complained of :— whereas, under Section 398, it can *prevent* the matters complained of or apprehended. In other words, only Section 398 is preventive ; Section 397 is not.

A complaint under Section 398 can be made only by a member or members and not by officers or directors who might be oppressed in these capacities [*Elder vs. Elder & Weston Ltd.* (1952) 102 Law J. 91 ; (1952) S.C. 49].

In the aforementioned case, the interpretation of Section 210 of the English Companies Act, 1948, corresponding to Section 397 of our Act, was considered. There it was alleged that the majority of the shareholders of a private company had removed two minority shareholders from their directorships and employment but there was no suggestion of mismanagement to the detriment of the shareholders. The Court held that these allegations could not support an application under the Section which required oppressive conduct to members in their character as members. Such conduct towards a member in any other capacity. *e g.* as a director or creditor could not *per se* justify an application. The "conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company, is entitled to rely" (*ibid* Per Lord Cooper).

Powers of Court on Application under Section 397 or 398 ; Without prejudice to the generality of the powers of making any order as it thinks fit under Section 397 or 398, the Court has, in particular under Section 402, the following powers :

(a) to regulate by order the conduct of the company's affairs in the future ;

(b) to order the purchase of shares or interest of any member or members of the company by the other members thereof by the company :

(c) in the case of a purchase of shares by the company as aforesaid, to order the consequent reduction of its share capital ;

(d) to terminate, set aside or modify any agreement, howsoever, arrived at, between the company on the one hand and any of the following persons on the other namely :—

(i) the managing director ;

(ii) any other director ; and

(iii) the manager ;

upon such terms and conditions as may, in the opinion of the Court, be just and equitable in all the circumstances of the case ;

(e) to terminate, set aside or modify any arrangement between the company and any person not referred to above. after giving due notice to, and obtaining the consent of the party concerned ;

(f) to set aside any transfer, delivery of goods, payment, execution of other act, relating to property made or done by or against the company within 3 months before the date of the application under Section 397 or 398 which would in the case of an individual be deemed in his insolvency to be a fraudulent preference : and

(g) to deal with any other matter for which in the opinion of the Court, it is just and equitable that provisions should be made.

The Court may make an interim order for regulating the conduct of the company's affairs, pending the passing by it of a final order under Section 397 or 398 (Section 403).

Where an order made under Section 397 or 398 involves an alteration of the memorandum or articles of association of the company, the company shall not have the right to make any alteration therein, subsequently, in a manner which is inconsistent with the order passed by the Court without its leave (Section 404). Certified copies of the alteration must be filed with the Registrar. Where, an order of the Court under the foregoing Section involves the termination of any of the agreement mentioned hereinbefore such termination shall not give rise to any claim for damages against the company for loss of office or in any other respect either under the agreement or otherwise. Further. no managing or other directors or manager whose agreement has been terminated or set aside shall, without leave of the Court, be appointed in any of the above capacity in respect of the company for a period of five years from the date of the order. Any contravention of this provision is punishable with imprisonment for a term which may extend to one year, or with a fine up to Rs 5,000 or with both. Before leave is granted. the Central Government must be notified and heard (Section 407).

Relief by the Central Government : Section 408 has vested some powers in the Central Government to prevent oppression or mismanagement. It can

exercise these powers either on its own motion or on the application of at least 100 members of the company or of members holding at least one-tenth of he total voting power therein. But exercising before such powers, it must make such enquiry as it deems fit and be satisfied that it is necessary to exercise its powers in order to prevent the affairs of the company being conducted either in a manner oppressive to any members of the company or in a manner prejudicial to the interests of the company or to public interest. Being thus satisfied, it may appoint such number of persons as the Central Government may, by order in writing, specify as being necessary to effectively safeguard the interest of the company, or its shareholders or the public interest, as directors thereof for such period not exceeding three years at one time as it may think fit [Section 408 (1)]. In the alternative, the company may be asked to elect its directors by the system of proportional representation by means of a single transferable vote so that the minority may also have representation in the Board of Directors of the company [Proviso to Section 408 (1)].

If the Central Government has passed an order under the Proviso to Section 408 (1), it may, should it deem fit, direct that until new directors are appointed pursuant to the aforesaid order, such number of persons as the Central Government may, by order in writing, specify as being necessary to effectively safeguard the interest of the company, or its shareholders or the public interest will hold office as *additional* directors [Section 408 (2)].

The director or directors appointed under sub-section (1) or (2) of Section 408 are not liable to retire by rotation as contemplated by Section 255 [Section 408 (3)]. These directors are not required to hold any qualification shares ; nor is their tenure of office liable to termination by retirement of directors by rotation. These directors may, however, be replaced by some others by the Central Government (Section 408 (4)]. No change in the Board of Directors, after a person has been appointed or directed to hold office of a director or additional director under Section 408 shall so long as such director or additional director holds office, be effective unless confirmed by the Central Govt [Section 408(5)].

On appointing directors or additional directors referred to in the first two sub-sections above, the Central Government may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs. Such directions can be issued not withstanding any thing contained in this Act or in any other law for the time being in force [Section 408 (6)]. The Central Government may require these directors or additional directors to report to it from time to time with regard to the affairs of the company [Section 408 (5)]

On a complaint being lodged by the managing or any other director or the manager the Central Government is empowered under Secton 409 to prevent any change in the Board of Directors, which is likely to affect the company prejudicially. The power conferred by this Section, however, cannot be exercised in relation to a private company, unless it is a subsidiary of a public company.

General Observation on Remedy for Oppression under Section 397 and 398 : The remedy available under Section 397 of the Companies Act, 1956, can be invoked only when the affairs of the company are being conducted in a manner oppressive to a shareholder or shareholders. Likewise, the remedy available under Section 398 can be invoked only when the affairs of the company are being conducted in a manner prejudicial to the interest of the company. These two Sections clearly postulate that at the time application is made, there must be a continuing course of conduct of the affairs of the company, which is oppressive to any shareholder or shareholders or prejudicial to the interest of the company. It is this course of oppressive or prejudicial conduct which can be made the subject-matter of a complaint in the application. The foregoing provisions of law do not confer any power on the Court to set aside or interfere with past and concluded transactions between the company and the shareholders or third parties, which are no longer continuing wrongs or to award a compensation to the company for the aggrieved shareholders in respect of such transactions (*Seth Mohanlal Ganpatram vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. (1964) 34 Comp. Cas. 777)*.

There are only two cases in which, on the application under Section 397 or 398 of the Companies Act, 1956 the Court is empowered to give relief in respect of past and concluded transactions which are no longer continuing wrongs : they are really in the nature of exceptions to the general principles as stated above. Firstly Section 402 (f) enables the Court to set at naught transactions amounting to fraudulent preference, effected within three months before the date of the application under Section 397 or 398 even though they are no longer continuing wrongs. Secondly, Section 406 of the Companies Act, 1956, read with Section 543 of that Act in the modified form set forth in Schedule XI enables Court on an application under Section 397 or 398 to bring to book delinquent directors, managers and other office-bearers of the company and to enforce the company's claim against them if they have misapplied or retained or have committed any misfeasance or breach of trust in relation to the company *(Seth Mohanlal Canpat ram vs Shri Satyaji Jubilee Cotton and Jute Mills Co. Ltd. and others, ibid)*.

Persons who hold majority of beneficial interests but minority of voting power, can complain of oppressions which term includes not merely obtaining unfair pecuniary advantage but also an overwhelming desire for power *(Re Harmer Ltd. 109 L.J. 24 C.A.)*. The remedy available is analogous to that of winding up and, consequently, Section 406 provides that Sections 439 to 544 shall only apply to companies in respect of which application has been made under Section 397 or 398 in form set forth in Schedule XI. Before seeking a winding up, a member must exhaust his remedy under section 397 [See Section 433 (f)].

Distinction Between Various Remedies for Oppressions

The remedies available are : (i) suit for injection and declaration by the minority shareholders who have been oppressed by an infringement of class rights.

etc. This is an exception to the rule in *Foss v. Harbottle*, 2 Hare 461 that in respect of wrong done to the company, only company can sue ; (ii) winding-up petition ; (iii) relief under Section 397 or 398. Remedy (i) applies where wrong consists of single act or acts and it has not been the course of a conduct. Remedies (ii) and (iii) apply where wrong is the outcome of a course of conduct and not due to an individual act. The oppressed shareholder must act reasonably exhausting the remedy (iii) before remedy (ii) can be availed of.

Powers of the Court and the Central Government Regarding Oppression and Mismanagement: The Court may, with a view to bringing to an end or preventing the matters complained of, make such order as it thinks fit, including order for the regulation of the conduct of the company's affairs in future ; the purchase of shares or interests of any members of the company by other members thereof or by the company ; the termination, setting aside or modification of any agreement between the company and its managerial personnel. In fact, the Court may make any order as may, in its opinion, be just and equitable in the circumstances of the case (Sections 398 and 402 of the Act).

Though the powers of the Court are very wide, the application for relief in cases of oppression and mismanagement must state, in the prayer, the nature of the relief sought. It must contain enough material to leave no doubt as to what the applicant desires the Court to do *[Re Laboratories Ltd, (1951).* 1. A.E.R. 110].

The powers of the Central Government are now unlimited. Under Section 408 it may appoint any number of persons to hold office as directors of a company when it is satisfied that it is necessary to make the appointments in order to effectively safeguard the interests of the company or its shareholders or the public interest.

In addition, under Section 409 of the Act, if the Central Government is satisfied on a complaint being made by any managerial personnel of a public company or a private company which is a subsidiary of a public company, that as a result of the change in the ownership of shares, a change in the Board is likely and that such change would, if allowed, prejudicially affect the affairs of the company, the Central Government may by order direct that no resolution passed or that may be passed or no action taken or that be taken to effect a change in the Board of Directors after the date of the complaint, shall have effect unless confirmed by the Central Government. The order of the Central Government shall be directed to prevent the change in the Board of Directors but will extend no further

Powers of the Central Government to remove Managerial Personnel ; The powers of the Central Government to remove a director of a company are contained in Section 388 B to 388 E of the Companies Act. The Central Government may state a case against any of the managerial personnel of a company and refer the case to the High Court with a request that the High Court may inquire

into the case and record a finding whether or not he is a fit and proper person to hold the office of director or any other office connected with the conduct and management of the company. The Central Government may exercise this power where in its opinion there are circumstances suggesting :

(i) that any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or breach of trust ; or

(ii) that the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices ; or

(iii) that a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains ; or

(iv) that the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest [Section 388 B (1)].

Every case under sub-section (1) shall be stated in the form of an application which shall be presented to the High Court or such officer thereof as it may appoint in this behalf [Section 388 B (2)].

The person against whom a case is referred to the High Court under this section shall be joined as a respondent to the application. [Section 388 B (3)]. The application made to the High Court must contain a concise statement of the circumstances and materials as the Central Government may consider necessary for the purpose of the inquiry, and be signed and verified in the manner laid down in the Civil Procedure Code, for the signature and verification of a plaint in a suit by the the Central Government [Section 388 B (4)].

The High Court may on the application of the Central Government, or on its own motion, by an interim order, direct that the respondent shall not discharge any of the duties of his office until further orders of the High Court ; and appoint a suitable person in place of the respondent [Section 388 C (1)]. Such appointee shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. [Section 388 C (2)].

At the conclusion of the hearing of the case, the High Court must record its findings (Section 388 D). If the finding of the High Court is against the respondent, the Central Government, by order, shall remove him from office [Section 388 (1)]. The person against whom an order of removal from office is made must not hold the office of a director or any other office connected with the conduct and management of the affairs of the company for a period of

5 years from the date of the order of removal. The Central Government may, with the previous concurrence of the High Court, remit or relax this period of 5 years [Section 388 E (3). On the removal of a person from office in the above manner, no compensation in any circumstance whatever is payable to him for the loss or termination of office [Section 388 E (4)]. The comany may, with the previous approval of the Government, appoint another person to the office in place of the person removed. [Section 388 E (5)].

Misfeasance : Where an officer has committed a breach of duty to the company the direct consequence of which has been a misapplication of its assets, for which he could be made responsible by an action at law or in equity such a breach of duty, if established, is a "misfeasance" *[Kingston Cotton Mills Co. In Re No. 2* (1896) *2 Ch. 279 C. A.].* Action for misfeasance can be taken under Section 543 of the Act. It does not, however, create new rights, nor does impose new liabilities. It is only a convenient procedure for enforcing rights and remedies which would ordinarily be enforceable by a direct action, if there had been no winding up. It is a summary remedy for enforcing, in the event of the liquidation of a company such liabilities as might have been enforced by the company itself or by its liquidator either at law or in equity. *[In re City Equitable Fire Insurance Co. Ltd (1925) 1 Ch. 407 at P. 527 ; Govind Narayan Kakada vs. Ranganath Gopal Rajopadhye (1930) 1 L.R. 54 Bom. 226].*

The Section, however, cannot be invoked in every case in which the company has a right of action against an officer of the company ; it is limited to cases where the action arises through a breach of duty by an officer of the company whereby a pecuniary loss has been caused to the company. Breach of duty would include misfeasance or breach of trust, in the stricter sense, and the Section will apply to a case of misapplication of money or property which the officer was bound to have paid or returned to the company. It is not the remedy available for claiming repayment of an ordinary debt, e.g. a sum overdrawn on account of salary or expenses in respect of a visit abroad *[Re Etic Ltd (2926) 1 Ch.861)].*

Concept of "Public Interest" and its Impingement on Company Law : The expression "public interest" is an elusive abstraction ; it means general welfare of the society or "regard for social good" and predicates "interest of the general public in matters where regard for the social good is of the first moment." According to Justice of the Supreme Court of the U.S.A., "the idea of public interest is a vague, impalpable, but all controlling consideration."

A thing is said to be in public interest where it is or can be made to appear to be contributive to the general welfare rather than to the special privileges of a class, group or individual. In common parlance, it is assumed to denote the interest of the community or nation as a whole as well as the State Government which represents it. "The expression is not capable of precise definition and has not a rigid meaning, and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and state of society and its needs.

Thus, what is 'public interest' today may not be so considered a decade later In any case, the expression cannot be considered in vacuo but must be decided on the facts and circumstances". [*Per Chief Justice Mahajan in State of Bihar v. Kameshwar, A.I.R. 1952 S C. 252*].

Since the concept of public interest is bound to undergo frequent changes with a change in our social, political and economic values, no hard and fast definition can be, and actually has been, laid down by the Act. Whatever further the general interests of the community as opposed to the particular interest of the individual (a company formed and registered under the Act is a legal person) is to be considered as "pubic interest", i e , an interest in which the community is directly and vitally concerned. A survey o the provisions of the Act would reveal the truth of the statement that the concept of public interest has been making rapid inroads in to the Indian Company Law, e.g., Sections 396, 397, 398, 408, 637AA etc. : Schedule VI also being intended to safeguard public interest.

A survey of the provisions of the Act would reveal the truth of the statement that the concept of "public interest' has been making rapid inroads into the Indian Company Law :

(i) Section 396, as you have seen earlier, empowers the Central Government to provide for *compulsory amalgamation of companies (notwithstanding anything contained in Sections 394 and 395) in to a single company in the public interest.* It may be noted that the expression "national interest" was used in 1956. The substitution of "public interest" for "national interest" was brought into effect by the Amendment Act of 1960. The Indian Companies Act, 1913 contained no provisions akin to those of Section 396. Therefore, such a provision was made in the Company Law for the first time by the Company Act, 1956.

(ii) You have read in your Study Paper on Auditing that Section 211 (3) empowers the Central Government to exempt any class of companies from compliance with any of the requirements in Schedule VI pertaining to form and contents of balance sheet and profit and loss account) if, in its opinion, it is necessary to grant the exemption in the *public interest.* [The expression "public interest" has been substituted for "national interest" by the Amendment Act, 1960]

(iii) The annual statements of account (in the form set out in Schedule VI) of a public company and its subsidiary companies are public documents (In the case of a private company, the profit and loss account is not a public document). The Companies Act, 1956 has laid down the minimum information which is to be disclosed in these statements along with general principle that it must exhibit a true and fair picture The information now required to be given is much more than that under the Indian Companies Act, 1913. The purpose behind this is, undoubtedly, the safeguarding of the *public interest.*

(iv) There may be a case where a transfer of shares in a company has taken place or likely to take place and, as a result thereof a change in the composition of the Board of Directors is likely to take place ; and further such a situation (in the Govt's opinion) may be prejudicial to the public interest. In such a case, the Central Government is empowered, under Section 250 (3) and (4) to impose restrictions on such transfers e g., the voting rights in respect of such shares shall not be exercisable for the period specified not exceeding three years-the resolution approving the transfer of such shares should first be sanctioned by the Government in order to be effective. Thus, the provisions of Section 250 have been extended in *public interest* also by the Amendment Act of 1960.

(v) Under Section 397, the member of a company has been given the right to file an application to the Court for appropriate lelief where the affairs of the company are being conducted, *inter alia*, in a manner prejudicial to *public interest* provided the requirements of Section 399 are fulfilled.

(vi) Under Section 398, the shareholder company can file an application to the Court for relief in cases (a) where the affairs of company are being conducted in a *manner prejudicial to public interest*.

(vii) Under Section 408, the Central Government is empowered to appoint such number of persons as the Central Government may, by order in writing, specify to hold office as directors in the company, where, on the application of the members of the company (holding the requisite qualifications) or of its own motion, the Government is satisfied (after holding such enquiry as it thinks fit) that these appointments are necessary in order to prevent the affairs ot the company from being conducted, *inter alia*, in a manner which is *prejudicial to public interest*.

(viii) Under Section 394 (1) of the companies Act, 1956, the Court has been empowered : (a) to refuse its sanction to any compromise or arrangement in connection with a scheme for the amalgamation of a company which is being wound up, with another company where it receives a report from the Company Law Board or the Registrar that the affairs of the company have been conducted *inter alia* in a manner *prejudicial to public interest ;* and (b) to refuse the dissolution of any transferor company under clause (iv) of Section 394 (1) where it receives a report from the Official Liquidator (on security of the books and papers of the company) that the affairs of the company have been conducted, *inter alia* in a manner *prejudicial to public interest*.

(ix) The officer of *public trustee* has been set up so as to enable him to take over the voting rights of shares and debentures held in trust from their trustees to be exercised in such manner as he may determine (Sections 153A and 158B). The object of this was to ensure that voting powers attaching to funds held in trust for the company or the public were

exercised to promote the public interest and not to further those of private individuals who had formed tax-free trusts ostensible for 'public motives'.

(x) The object of Section 13 (c) and (d) (as amended in 1965 on the recommendation of the Vivian Enquiry Commission and endorsement of the recommendation by the Daftary Sastri Committee) is to enable shareholder and others interested to a form a clear idea of the 'main object' and other object. This amendment, in combination with Section 149 [2A] which requires that whenever a company embarks on any kind of business activity regarding "other objects" the sanction of the company by special resolution must be obtained will give the shareholders an opportunity to know for themselves the actual business which the company is carrying on or proposes to carry on. This is likely to put a positive check on the public money being jeopardised.

(xi) The evasion of income-tax or super-tax is a matter of public interest *benami* shareholding and shareholding in the names of fictitious or non-existing persons were once very common because in such case tax might be evaded and the revenue could be defrauded in cases where the super-tax limit was reached. To check such a practice, Section 68A has been incorporated in the Act in 1965, rendering it a punishable offence for a person to apply for or get an allotment of share or get a transfer of shares registered in the names of fictitious or non-existing persons or *benamidars*. Further, to check such practice, both the *benamidar* and the holder of beneficial interest in a share have to make declarations under Section 187C (introduced by the Amendment Act 1964).

The Central Government is empowered to state a case against managerial personnel to the High Court under Section 388B where the circumstances suggest that the company is or has been conducted and managed by such person in a manner which is likely to cause or has caused serious injury or damage to the *interests* of trade, industry or business to which such company pertains *(vide* Amendment Act of 1963].

SELF-EXAMINATION QUESTIONS

(Answers not to be written out. They may be seen at the end of the Study paper.)

36. (a) When oppression or mismanagement is complained of, can the Central Government apply to the Court for redress ?

(b) Can it also authorise a person or a member to make an application ?

37. Answer the following question :

(a) In the case of an application for oppression, can Court interfere if the conditions, warranting a winding up a order on just and equitable ground, do not exist ?

(b) If the conditions referred to in (a) exist and the winding up of the company would not unfairly prejudice the member or members, can the Court interfere ?

(c) Can the Court make an interim order for regulating the conduct of the company's affairs, pending the final order Section 397 or 398 ?

(d) Can tne Court, in the case of oppression and mismanagement, set aside or interfere with past and conclude transactions between the company and the shareholders or third parties which are no longer continuing wrong ?

(e) Are there any exception to rule underlying (b) above ?

ANSWERS :

1. (a) Yes ; (b) No ; (c) Yes ; (d) No ; (e) Yes. 2. (a) (iii) ; (b) (i), (c) (ii) ; (d) ; (e) (i) ; (f). (v). 3. Yes. 4. (a) Yes ; (b) Yes ; 3 days from the date of the grant : (c) By imposition of the prescribed penalties ; (d) Yes, at the registered office of the lending company. 5. No. 6. (a). (i) ; (b) (iv) ; (c) (ii) : (d) (ii) ; (e) ; (f) (iii) ; (g) (iii) : (h) (i), (ii). 7. (a) Compromise ; (b) Arrangement ; (c) Reconstruction. 8. (a) Yes : (b) No. 9. Yes. 10 (a) Yes ; (b) Company or creditor or members ; (c) Yes. 11. No unless the majority represents 3/4ths in value of the creditors : 12. (c). 13. (b). 14. Yes ; 15. No. 16. (a). 17, (a) ; Yes ; (b) No ; (c) Yes, only regarding the first part of the statement ; (d). No. (e) Yes ; (f) No. 18. Order the winding up of the company. 19. (a). Yes ; (b) On the receipt of a report from the Company Law Board or Registrar that transferor company's affairs have not been conducted prejudicially to its members' interests or public interest. 20. contingent. 21. No. 22. Yes ; provided the conditions prescribed by Section 319 are fulfilled ; 23. (a). (i) ; (b) (ii) ; (c) vi 24. (a) Transferee company's shareholding in the transferor company be included for the purpose ; (b) Yes, only if they constitute at least 3/4ths in number ; (c) No. 25. (a) Yes ; (b) Yes ; (c) With the Court and within one month from the date of the notice received from transferee company. 26. (b) (d), (e) & (g) ; 27. Central Government. 28. (b). 29. Yes. 30. Yes. but not without Central Govt's previous permission 31. Yes, it is a member's voluntary winding-up. 32. No. 33. By a special resolution : 34. The former is in respect of a company which is a going concern and the latter is in respect of company in liquidation. 35. (a) No ; (b) No ; (c) No ; (d) ; (e) No (f) No ; (g) Yes. 36. (a) Yes ; (b) Yes ; 37. (a) No ; (b) No ; (c) Yes ; (d) No ; (e) Yes, See 406 Section 402 ; (f) and Section read with Section 543 in the modified from set forth in schedule XI.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL F.S.P. (N) Adv. CL—4

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FINAL COURSE (N)

COMPANY LAW

STUDY—IV

Contents :

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- Committee of Inspection.
- Control Exercisable by Central Government over Liquidators.
- General power of the Court in case of winding up by Court.
- Final Winding up.
- Effect of Dissolution.

Prescribed Readings :

1. *Lectures on Company Law*, 17th Edition, by S.M. Shah.
2. *Principles of Company Law*, 1977 Edition, by M.C. Shukla and S.S. Gulshan.
3. *Indian Company Law*, Latest Edition, by Avtar Singh.

Implication of winding-up : The winding up—more popularly known as liquidation—of a company relates to the proceedings by which (a) all its affairs are wound up, (b) its rights and liabilities are discerned, and (c) the claims of its creditors are settled either fully or to such an extent as may be warranted by the assets of the company. Having met all the obligations of the company out of the assets realised, the surplus assets of the company, if there be any, are distributed among its members in proportion to their rights laid down by the articles of association. On this being done and on compliance with certain other statutory requirements, the company is said to have been dissolved.

The term 'winding up' should not be construed as synonymous with 'bankruptcy'. In the matter of winding up, the general rule is that a company may be wound up if its members so desire or if it cannot pay its debts or if its extinction is considerd desirable on any account. It thus follows that a company may be wound up even if it is otherwise solvent, as where the winding-up is for purposes of reconstruction. Moreover, a company cannot be declared bankrupt, in spite of the fact that it is unable to pay off its debts—it can be only wound up in such a case.

Where a solvent company is being wound up, all debts payable on a contingency and claims against the company, present or future, certain or contingent, are admissible to proof against the company, a just estimate being made, as far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value Section (528). As regards the right of the creditors of the company which is being wound up for its inability to pay to its debts, the same rules prevail as case of insolvency law in respect of debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).

The secured creditor may rely on the security and ignore the liquidation alltogether, or value his security any prove for the balance of his debt, or give up his security and prove for the whole amount. Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first ; liability for dividends is satisfied only if the claims of the outsiders are fully met.

So far as the employees are concerned, a winding-up order by a Court operates as a notice of discharge to the employees and officer of the company except when the business of the company is continued [Section 445 (3)]. A voluntary winding up which involves a discontinuation of the business also operates as a notice of discharge, and may also rise to a claim for damage where there is an agreement for employment for a fixed time (*Reigate v. Union Manufacturing Co.* (*1918*) *I.K.B. 592*).

A company, being a body corporate, continues in existence until it is dissolved according to law. Dissolution can be brought about in the following ways :—

1. By removal of the company's name from the register by the Registrar (without winding up order) : A defunct company is the one which has not been legally dissolved

when it ought to have been dissolved, but the name of which continues on the Register of Companies maintained in the Registrar's office.

Where the Registrar has a reasonable ground to believe that a company is not carrying on business or is not in operation he must send to the company a letter through post enquiring if it is carrying on business or is in operation. If no reply is received by him within one month, the Registrar, within 14 days after the expiry of the period of one month, must send to the company a registered letter referring to the first letter and stating that no answer thereto has been received and further stating that if no answer is received to the second letter within one month of the date thereof, a notice will be published in the Official Gazette with a view to striking the company's name off the register. If the Registrar either gets a reply to the effect that it is not carrying on business or is not in operation, or does not within one month, after the second letter, receive any reply, he may publish in the Official Gazette and send to the company by registered post a notice that at the expiry of a period of three months from the date of that notice, the name of the company will, unless cause is shown to the contrary, be struck off the Register and the company will be dissolved.

If the Registrar has reason to believe either that no liquidator is acting or that the affairs of the company has been completely wound up, and any returns required to be made by the liquidator have not been made for consecutive six months, the Registrar must publish in the Official Gazette and send to the company a similar notice When the time stipulated in such notice expires, the Registrar may, unless cause to the previouly shown, strike its name off the Register and publish notice thereof in the Official Gazette, whereupon the company shall stand dissolved.

But the liability (if any) of every director, manager or other officer who was exercising any power of management and of every member of the company, shall continue. This liability may be enforced as if the company had not been dissolved. Also, the aforesaid provisions will not affect the power of the Court to wind up a company the name of which has been struck off the register.

Where a company has been struck off the register, the company, or any member or creditor who feels aggrieved, may, within 20 years from the gazetting of the notice, apply to the Court to have the company restored to the register. If the Court is satisfied that the company was carrying on business or was in operation when struck off or that it is otherwise just that it be restored to the register, it may make an order accordingly. When a certified copy of this order is delivered to the Registrar for registration, the company would be deemed to have continued in existence as if its name had not been struck off.

A letter or notice referred to above may be addressed to the company at its registered office. If there is no such office, it may be addressed to the company to the care of some director or other officer of the company. If there is no such director or officer whose name and address is known to the Registrar, it may be sent to each of the persons who subscribed to the memorandum at the address mentioned in the memorandum [Section 560].

Revival of defunct company under Section 560 and dissolved company under Section 559.

Section 559	Section 560
(i) Application for revival must be presented by the liquidator or other person who appears to the Court to be interested.	(i) Application to be made by the company, or any creditor or member.
(ii) Limitation period for application is 2 years of the date of dissolution.	(ii) Limitation is 20 years, from the date of gazetting of the notice.
(iii) Acts done after dissolution and before revival are not validated by order of revival.	(iii) Such acts, done after the name of company being struck off before revival are validated: *Tymans Ltd.* v. *Craven* (1925) 1. A.E R. 513 C.A.

2. *By order of the Court or by the order of the Central Government under Section 396* : A company whose undertaking is being transferred to another company under a scheme in accordance with Section 394 may be dissolved by an order of the Court [Section 394 (1) (iv)].

The dissolution of existing two or more companies may take place when the Central Government, by virtue of Section 396, orders of the amalgamation of the said existing companies into a new single company in the public interest.

3. *By winding up* : This method is by far the most common one and is followed when for any reason other than those mentioned above, the company's existence is not desired or ought to be terminated, *e g.*, because the object for which the company had been formed has been accomplished, or because the company is insolvent,

Modes of Winding up : Part VII of the Act deals with the winding up of a company. Under Section 425, a company may be wound up either : (i) by the Court (compulsory winding up) ; (ii) voluntarily ; (iii) subject to the supervision of the Court. Whichever method is adopted, liquidator or liquidators must be appointed to administer the property of the company, and they first apply the assets of the company towards the payment of debts which have statutory priority in a winding up, next to the payment of creditors in their order of precedence and then distribute the surplus, if any, among the shareholders according to their rights *inter se*.

In respect of companies with a paid-up capital of less than Rs. 1 lakh, winding-up jurisdiction can be conferred on the District Courts. In other cases, only the High Court has juridiction in winding up matters (Section 10).

Distinction between these modes of winding up :

	Compulsory	Voluntary	Subject to Supervision of Court
1. Significance	Settlement of affairs of the company by the Court—the Court being the absolute controlling authority.	Settlement of affairs without the intervention of the Court, either by members or by creditors with, of course, a right to apply to the Court for any directions or order if and when necessary. If the directors are in a position to make the statutory declaration of solvency required u/s 488, it will be conducted as a member's voluntary winding up—members having the controlling authority over, and creditors having no voice in, the proceedings. If the directors cannot make the declaration, it would be all creditors' affairs.	Settlement of the affairs through the intervention of the Court—not from the outset as is the case in compulsory winding-up but after the passage of the resolution for voluntary winding up, on the application by creditor, contributory or voluntary liquidator. From this stage onwards the controlling power shifts from the members or creditors (as the case may be) to the Court.
2. Grounds : those specified in Section 433.		These specified in Section 484.	Interests of the company or contributories or of creditors.
3. Commencement	From the presentation of the petition (S. 441).	From the passing of the resolution (S 441)	From the passing of the first resolution for voluntary winding up, for supervision does not commence winding up but continues with that already commenced (*In re Tourine & Co.* (*1883*) *25 Ch. D 188*)
4. Liquidators.	Official Liquidator eventually becomes liquidator and acts under Court's supervision (S 450).	In case of member's, liquidator or liquidators are appointed by the company in general meeting (S. 490) In the other case creditors and members appoint a liquidator in their respective meetings. If these appointees are different per-	Unless the Court appoints an additional liquidator or Official Liquidator as a liquidator in terms of Section 521, the liquidator already appointed in the voluntary winding up acts as the liquidator.

		sons, the creditors' choice prevails unless any director, member or creditor, within 7 days after nomination made by the creditors, applies to the Court for an order that the company's nominee shall be the liquidator instead of or jointly with the creditors' nominee or for an order appointing Official Liquidator or some other person that the creditors' nominee. In the absence of any nomination by creditors, the company's nominee acts as the liquidator (S. 502).	
5. Transfer of shares made after the commencement of winding up :	Void unless the Court orders otherwise [S. 536 (2)].	Valid if made to the liquidator or to any other person with the sanction of the liquidator [S. 536 (1)].	Void unless the Court orders otherwise [S. 536(2)].
6. Attachment, distress or execution, etc. against the company after commencement of winding up :	Void when put in force without the leave of the Court (Section 537.)	This rule is inapplicable to the voluntary winding-up.	Void [S. 537].
7. Prosecution of delinquent officers or members:	Liquidator can do so only on the direction of the Court [S. 545(1)].	Liquidator cannot do so ; he can only report to the Registrar for the appropriate action [S. 545(2)].	Liquidator can do so [S. 545].

Contributories : In a winding up, the term "contributory" means past or present members. Strictly, it means every person liable to contribute to the assets of a company in the event of its being wound up, and includes holders of shares which are fully paid ; for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, persons who are to be deemed contributories ; the term 'contributory' includes any person alleged to be a contributory (Section 428).

If a member is once placed on the list of contributories, he is liable to the extent of original shares that remain unpaid, unless he proves that he should not have been placed on the list For instance, some applicants consented to become shareholders of a company on the condition that their suggestions were included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters. But the applicants signed usual applications for shares which were allotted to them and thereby became shareholders of the company. It was held that it was not open to them to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled (*East Bengal Sugar Mills Ltd.* In re : (1941) 11 Comp. Cas. 169.)

Liability of contributories as present and members (Section 426) : When a company goes into liquidation, every member, whether past or present, has to contribute to the assets of the company. However, a past member will not be required to contribute in the following circumstances :

(a) if he had ceased to be a member for a period of one year year or upwards before the commencement of winding up.

(b) if the debt or liability of the company was contracted or incurred after he ceased to be a member ;

(c) if the present members are able to satisfy the contributions required to be made by them under the Act.

There is, however, a limitation on the amount the members may be required to contribute. In the case of a company limited by shares, any past or present member is not required to contribute in excess of the amount, if any, unpaid on the shares in respect of which he is liable as such member.

In the case of a company limited by guarantee, a past or present member is not required to contribute an amount which is excess of the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up. In the case of a company limited by guarantee but having a share capital, every member (present or past) of the company is liable, in addition to the guaranteed amount, to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

When any provisions are contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted or whereby the funds of the company are alone made payable, the liability of the contributory will be subjected to such a provision. Dividends, profits or other sums due to a past or present member, must not be treated as debts due from the company pay-

able to that member for setting off the rights of the members as against creditors claiming otherwise than in the character of past or present members. But such sums shall be taken into account for finally adjusting the rights of the contributories *per se* [Sec. 422 (i) (f) and (g)]. According to Section (1) (g), and debt due to a past member in respect of unclaimed dividends cannot be admitted to rank in competition with the debts due to ordinary creditors [Re : *Consolidated Goldfields of New Zealand Ltd.* (*1953*) Ch. 689].

The liability of a member to be included in the list of contributories is not *ex contractu* but *ex lege*. This is borne out by Section 426. It provides that the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time specified in the calls made on him by liquidator. In other words, the liability of a contributory though commencing at the date when he entered into the contract with the company under which he became a member, is only contingent upon the company being wound up, inasmuch as it is, until a call is made, nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding up. Thus the liability of a contributory arises *ex lege* and not *ex contractu* The effect of this provision is to give to the liquidator a new cause of action which a company itself might not have. For instance, if the claim of a company for the realisation of any call from a member is barred by limitation, such member becomes liable to pay all that has remaind unpaid on his shares including the unpaid call when the company goes into liquidation [In re *East Bengal Mills Ltd.* Supra] This statutory liability of the contributory is a new liability which arises after the winding-up of a company has started. Therefore, it is no answer to a liquidator's claim against any person whose name appears on the register of members that there was an agreement with the directors to exclude this statutory liability [*Hansraj Gupta* v. *Asthana* (1932) P.C. 240].

A director or manager—whether past or present -- whose liability under the provisions of the Act is unlimited shall, apart from his liability to contribute as an ordinary member, be liable to make a further contribution as if he were a member of an unlimited company. No further contribution is required of him.

(a) if he has ceased to hold office for a year or more before the commencement of the winding up ;

(b) if the debt was one which the company had contracted after he had ceased to hold office ;

(c) subject to the articles, the director or manager shall not be liable to contribute so as to satisfy the debt or liability of the company and the costs, charges and expenses of the winding up unless the Court deems it necessary (Section 427).

Contributories in case of death or insolvency of member or of winding up of a body corporate which is a member : In the case of death of a member, his legal representative will be liable as contributories whether the death took place

before or after his name had been placed on the list of contributories. The assignees of insolvent members are liable as contributories subject, however, to their power of disclaimer. When a body corporate which is a contributory is in the process of a winding up, it will be represented by its liquidator in regard to its own liability, and the liquidator shall be a contributory subject, however, to his power of disclaimer (Sections 430, 431 and 432).

COMPULSORY WINDING UP

Circumstances for compulsory winding up : Section 433 deals with the circumstances in which a company may be wound up by the Court. These are as follows :

(a) if the company has by a special *resolution* resolved that it shall be wound up by the Court ;

(b) if the company defaults in delivering the statutory report to the Registrar or in holding the statutory meeting. But instead of ordering such a company to be wound up the Court may direct the report to be filed or the meeting to be held ;

(c) if the company does not commence its business within a year from its incorporation or *suspends its business* for a whole year. It should be noted that the power of the Court to wind up, when the company has not carried on business for a year, is discretionary and it will not be exercised unless there are indications that the company has no intention to start or to continue its business. However, the Court would not grant an order against the wishes of a majority of the contributories if the delay in commencing, or the interruption of, the business is explaind and if it is satisfied that business would be commenced or resumed [*Murlidhar* v *Bengal Steam Co. Ltd.*, (*1921*) I.L.R. 47 Cal. 654] ;

(d) if the number of members is reduced below seven in the case of a public company or below two in the case of a private company, the Court would, however, permit the company to wind up itself voluntarily. In this connection, it is necessary to recall that according to the provisions contained in Section 45 of the Act a member is personally liable for the debts of the company if the number falls below the statutory minimum and the business is carried on for more than six months after the number has been so reduced and such a fact is within the knowledge of the shareholders ;

(e) if the company is unable to pay its debts. Under Section 434, a company is deemed unable to pay its debts in any of the following circumstances ;

(i) If a creditor of the company, to whom the company by assignment or otherwise owes a sum exceeding Rs. 500, has demanded the same in writing, and the company has for 3 weeks thereafter neglected to pay the amount or to secure or compound for it to the reasonable satisfaction of the creditor.

The above-mentioned letter of demand may be delivered by registered post or otherwise at the registered office of the company. The meaning of the word "delivered" in respect of a registered letter cannot be limited to cases when the registered letter is accepted by the addressee. A tender of such a letter, even if it is refused by the addressee, is a good delivery. The refusal to take the delivery of the letter precludes the addressee from pleading ignorance of its contents

Prior to an order for winding up a company being made, it is required to be shown that the debt due from the company is presently payable and that the title of the petitioner is complete. A petition cannot be supported on the allegation that some debt is due. unless it was a debt for which a statutory demand was made. [In Re. *Jambad Coal Syndicate Ltd.* I.L.R. 62 Cal. 294].

The demand under clause [i] above is called statutory notice and highly formal. Notice served at some place other than the registered office of the company will be invalid [*Bakhtiarpur Bihar Light Railway Co. Ltd.* v. *Union of India* [1954] 93 Cal L.J. 271] But if the comyany has no registered office, then the notice of demand for the payment of the debt may be given at the place where the company carries on business *British & Foreign Apparatus Co.*, (1865), 12, L. T. 368). Where the debt is *bona fide* disputed, clause (i) does not apply ;

(ii) If execution or other process issued on a decree or order of a Court in favour of the creditor of the company is returned unsatisfied in whole or in part ; or

(iii) If it is proved to the satisfaction of the Court that the company is unable to pay its debts.

A company may be wound up even when its assets are valuable, if they are locked up in investments and the company is carried on at a loss. In considering whether a company is able to pay its debts, the company's contingent and prospective liabilities have to be taken into account, and, therefore, it may be unable to pay its debts, although it has paid its debts as they become due, if its existing and probable assets will be insufficient to meet its prospective liabilities

To justify the application of clause (iii) above, the company may be, in the words of Sir William James, V.C. "commercially insolvent". Insolvency may be proved easily by notice under clause (i) ; under clause (iii), it is more difficult to prove to the satisfaction of the Court For instance, the fact that the liabilities of a company far exceed its assets does not *ipso facto* mean that the company is unable to pay its debts and does not give rise to a ground for compulsory winding up under Section 433. It is rather the 'commercial insolvency' (i.e , the circumstances in which the existing assets and liabilities "are such as to make it reasonably certain .. .. as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liability") which affords an occasion for compulsory winding up on the ground of inabilities to pay off its debts. A particular company may have the capacity to meet the demands of its creditors ; in that case, a winding up order would be unjustified [*Krishnaswamy* v. *Stressed Concrete Construction (Pvt.) Ltd.*, A.I.R. 1964 Mad. 191].

In the *Registrar of Companies, Punjab* vs. *Ajanta Lucky Scheme and Investment Co. Private Ltd. and Others* (*1973*), *43 Comp. Cas. 314*, the Registrar of Companies filed petition for the winding-up of the respondent company under Section 433 (e) read with Section 439 (5) of the Act on the ground that the company was unable to pay its debts and that its liabilities, exceeded its assets. The two issues that emerged therefrom were as follows, *viz.* (a) whether the company was unable to pay its debts and meet its liabilities ; and (b) whether it was a proper case for winding-up. *Held*: (a) That for determining the company's ability or otherwise to pay its debts, it was to be considered whether the company was able to meet its liability as and when they accrued due. Section 434 of the Act prescribes the circumstances in which a company was to be treated as unable to pay its debts. Admittedly, none of these circumstances was present in the case in question and no complaint had ever been received by the company from its creditors as regards non-fufilment of any of their claims was pending against the company. In a case where no debt had been due, a demand therefore could not be made The mere fact that certain liabilities might accrue due in future, which could exceed the existing assets of the company, would not necessarily lead to the conclusion that the company would be unable to meet its liabilities when they accrued due. The mere fact of the company's liabilities being in excess of its assets could not *ipso facto* be a ground for putting the company into liquidation. The test would be that the company should be commercially solvent, *i e.*, the company ought to be in a position to meet its liabilities as and when they arose ; (b) that there was no ground for winding up, because it was shown that (i) the paid-up capital had augmented, every year the business flourished, to its profit and the subscribers' claims on maturity had been met ; and (ii) any creditor or contributory or even the Reserve Bank had never lodged any complaint against the financial stability of the company.

(f) "just and equitable" rule : Where there is a petition to the Court to wind-up a company on the ground that it is "just and equitable", the Court has power to make a winding-up order in any case where the special circumstances are such that it appears just to make such an order. Such orders have been made by the Courts in the following circumstances.

(i) Where the sub-stratum of the company has disappeared, *e.g.*, where the main object of the company was to acquire and work a mine or patent or concession which could not be obtained or where the mine was worthless or the patent was invalid or the concession has lapsed [Re : *German Date Coffee Co.* (1882) 20 Ch D 169].

A company will not be wound up because it had ceased to carry one of several businesses authorised by its memorandum unless, upon a fair construction of the memorandum, that business is regarded as the main object of the company [Re, *Amalgamated Syndicate* (1897) 2 Ch. 600]. Similarly, a company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company.

Thus the sub-stratum of a company is deemed to have disappeared or gone. if the main object for which the company was formed has become impracticable, *i e.*,

permanently impracticable. "Usual tests for determining whether the sub-stratum of the company has disappeared are whether : (a) the subject-matter of the company is gone, or (b) the subject for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, which means that there is no reasonable hope that the object of trading at a profit can be attained or (d) the existing and probable assets are insufficient to meet the existing liabilities" [In re *Kaithal Cotton and General Mills Co Ltd*, 1951, 31 Comp. Cas. 461]

Where the sub-stratum has gone, the Court can wind up the company, even though the majority of the shareholders oppose the winding-up order. But before the Court can wind up on this account, it must be proved that the whole of the business of the company has become impossible of being carried on. The question whether the sub-stratum has gone or not would depend not on the intention of the Board of Directors or of the shareholders, but would depend upon, and should be decided by, the Court, on a true and accurate construction of the memorandum of association and the actual facts of the case [*Mohan Lal Mehta* vs. *Chunilal Mehta*, (1962) 32 Comp. Cas. 970].

If there are two or more main objects and some are frustrated and some are pursued, the company cannot be wound up. All the main objects must be destroyed in order to justify winding up [*Kitson & Co.* (1946) I.A.E.R. 435 (C.A.)]. It should be noted that even if the sub-stratum is gone, if the members do not ask for winding up, carrying on of the other objects of the memorandum will not be *ultra vires*.

(ii) Where there is a deadlock or a crisis in the management of a company, *e.g.*, where the two sole shareholders, who were also directors, were not on speaking terms owing to disagreement [Re : *Yenidje Tobacco Co.* 1916, 2 Ch. 426] ; where there is a *deteriorating state* of management and control of business owing to sharp differences between the members as reflected in their resolutions at their meetings [*Vijayalakshmi Talkies* vs. *Rao*, A.I R. 1966 Andh. Pr. 285] ; where the mismanagement is such that there is no practicability of remedying it [*Rajahmundry Electric Corporation* vs. *Rao*. A I.R. 1955 S.C. 213]. However, factions, quarrels. *etc.*, among shareholders are not sufficient grounds [*S.S. Raj Kumar* vs. *Project Castings Private Ltd.* (1968) I *Comp. L.J. 41*].

(iii) Where the company has been formed to carry on a fraudulent or an illegal business.

(iv) If the company is a "bubble", *i e.*, if it never had any business to carry on (Re *Landon & County Coal Co 1867, 3 Eq. 355*].

(v) Where the company is insolvent and is being carried on for the benefit of the debentureholders [Re. *Clandown Colliery Co. (1915) 1 Ch. 369*].

(vi) Where the petitioner was excluded from all participation in the business.

(vii) Where preponderance of voting power was permanently vested in a Board in which minority shareholders had justifiably no confidence [*Loch* vs *John Blackwood Ltd.* (1924) A.C. 783].

Clause (f) of Section 433 should not be construed as *ejusdem generis* [*i.e.* of the some kind or nature] with the other clauses [a] to [e] of that Section. The ground need not at all be similar to any of the other grounds mentioned in Section 433.

The Alternative Remedy to Winding up in Cases of Oppression : Cases have arisen from time to time where minority shareholders have found it difficult to resist oppression by the majority. Section 397 provides that, where the affairs of a company are being conducted in a manner oppressive to some members, the Court may, with a view to bringing to an end the matters complained of *make such order as it thinks fit* to remedy the position, when the winding up of the company would unfairly prejudice the complaining members. A similar relief can be applied for in the case of mismanagement, where the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or when a material change in the management or control of the company or in its constitution is likely to prejudice the interest of members of the company [Section 398]. [For a detailed discussion of this remedy students should refer to F.S.P. (N) CL-3].

Who may Petition for Winding-up : (Section 439) : The various persons who can make an application for the winding-up of a company through Court are : (1) the company ; (2) any creditor or creditors, including any contingent or prospective creditor or crediors ; (3) any contributory or contributories ; (4) all or any of the above parties, together or separately ; (5) the Registrar ; and (6) any person authorised by the Central Government in a case falling under Section 243 of the Act (*i.e.*, when the Central Government is satisfied that it is just and equitable that the company should be wound up on the ground that the business of the company is being conducted in a fraudulent or unlawful or oppressive manner or that the company was formed for any fraudulent or unlawful purpose, *etc*

A creditor has a right *ex debito justitiae* [*i.e.*, a remedy which the applicant gets as a right] to a winding-up order if he can prove that he claims an undisputed debt and that the company has failed to discharge it. Under Section 439 (8), a contingent or prospective creditor, however, must obtain leave of the Court, give security for costs and the Court must be satisfied that there is a *prima facie* case for winding-up of the company. The Central Government or any State Government or Municipal or other local authority to whom any tax or other public charge is due is also an entity comprised in the term creditor'.. It has been held in *Hari Nagar Sugar Mills Co. Ltd.* vs. *M.W. Pradhan* [*Court Receiver* (1962), 2 *Com. LJ. 17* [*S.C.*] that a receiver of creditors' properties is also a creditor and as such he has a right to present a petition. He is creditor by statutory assignment. A secured creditor, the holder of any debentures [including debenture stock] whether or not trustees have been appointed in respect of such and other like debentures and also the trustee for the debentureholders are creditors and hence entitled to present a petition for winding-up [Section 439 (2)].

A contributory can present a petition only when : (i) the number of members falls below 7 or below 2 in the case of a public or private company respectively ; or (ii) he holds shares which were originally allotted to him or has held shares for six out of the eighteen months prior to the commencement of winding up, or the shares have devolved on him through the death of a former holder [Section 439 (4)]. A holder of fully paid-up shares is also entitled to present a petition. This right of his as a contributory cannot be excluded on the ground that the company has no assets at all or that it may not have any surplus assets left for distribution among the shareholders after the satisfaction of its liabilities [Sec 439(3)].

The Registrar may present a petition for winding-up only on the ground that default has been made in delivering that statutory report to him or in holding the statutory meeting. or that the company has not commenced its business within a year from its incorporation, or that from the financial condition of the company as disclosed in its balance sheet or from an inspector's report under [Section 235 or 237], or the report of a special auditor appointed under [Section 233A] it appears that the company is unable to pay its debts. But such a petition can be made only with the previous approval of the Central Government [Sec. 439 (5)].

The Official Liquidator may also present a petition for winding-up by the Court, where the company is being wound up either voluntarily or subject to the supervision of the Court. And the Court, before making a winding-up order on such petition, must be satisfied that in the circumstances such a winding-up cannot be continued, due regard being had to the interest of the creditors or contributories or both (Section 440).

Powers of Court on Hearing Petition (Section 443) : The winding-up petition and its hearing are governed by Rules 95-123 of the Companies (Court) Rules, 1959. Such a petition is required to be made in Form No. 45, (General form of petition), 46 (*viz*, petition by creditors), or 47 (*viz*, petition by company), as the case may be with such variations as the circumstances may require, and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation.

After the Court hears the petition, it may (i) dismiss it with or without costs, (ii) adjourn the hearing conditionally or unconditionally, or (iii) make an interim order, or (iv) make an order for winding-up of the company. It must not refuse to make a winding-up order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

If a petition for winding-up is presented on just and "equitable" ground the Court may refuse to make an order of winding-up if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking winding-up instead of pursuing that other remedy.

Where the petition is presented on the ground of default in delivering the statutory report or in holding the statutory meeting, the Court may direct that the report be delivered or the meeting be held instead of making the winding-up order.

The persons considered responsible for the default may be charged with the costs involved.

Date of Commencement of Winding-up by Court. (Section 441): Where, before the presentation of a petition for the winding-up of a company by the Court, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time the resolution was passed. Unless the Court on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding-up shall be deemed to have been validly taken. In any other case, the winding-up of the company by the Court is deemed to commence at the time of the presentation of the petition for the winding-up.

This date is important for several reasons. Some of the immediate effects are that the Official Liquidator becomes the liquidator of the company (Section 449). A statement as to the affairs of the company has to be submitted to him and he has to report thereon to the Court (Section 454 and 455). The winding-up order constitutes a notice of discharge to the officers and employees of the company except when the business of the company is continued [Section 445 (3)]. The Court has to communicate winding-up order forthwith to the Official Liquidator and the Registrar (Section 444).

Within 30 days from the date of the making of a winding-up order, a certified copy of the order must be filed with the Registrar by the petitioner and the company [Section 445 (1)]. In computing this period of 30 days, the time required for obtaining a certified copy of the order is to be excluded. Then the Registrar shall make a minute thereof in his book relating to the company and shall notify in the Official Gazette that a winding-up order has been made.

When the winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator no suit or *other legal proceeding* can be commenced or if pending at the date of the order, shall be proceeded with against the company except by *leave of the Court* and subject to terms imposed by it [Section 446 (1)]. The expression : "or other legal proceeding", in [Section 446] does not mean a legal proceeding analogous to a suit (*Shaikh Mansoor* vs. *Government* A.I.R. 1952 T.C. 14). An award under the Industrial Disputes Act is not a legal proceeding (*Price* vs. *Chandrashekharan* A.I.R) 1951 Mad 987. Leave of court will be granted where a shareholder applies for rescission or the suit is for specific performance

As regards the 'Leave of the Court' appearing in [Section 446 (1)], the Supreme Court decision is that the Court has the jurisdiction to grant leave to proceed with a suit or other proceeding against a company in liquidation, even if such leave was not obtained for the commencement of the suit or proceeding. "The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the High Court" [*Bansidhar Shankarlal* vs. *Mohammed Ibrahim* (1971) Comp. Cas. 21]. But the Court does not grant this leave as a matter of course. The facts and circumstances of each case have to be probed into by the Court. The discretion of the Court must be exerted judicially but not capriciously or arbitrarily. Usually, leave is granted

where outsiders get linked up with some dispute with the company and the Court thinks it fit that the dispute should be settled in an action by the ordinary Civil Court. It has been held that against an order refusing leave to institute a suit, an appeal lies under [Section 483 (*Balakrishan* vs. *Indian Association Chemical Industries Ltd. A.I R.) 1959 Bom. 41*)].

Suppose, RC, a labourer of GD & Co. Ltd. which is in liquidation, prays for permission of the Court to implead the Official Liquidators as the party respondent in a claim petition made before the Labour Court subsequent to the winding-up order. Should the leave be granted in this case ? It has been held [*R. Chidambaranathan* vs. *Gannon Duhkerly & Co (Madras) Ltd (1973) 43, Comp. Cas 500*] that the prayer for leave under [Section 446 (1)] was misconceived. In the event of such leave being granted, a flood gate of litigation would be opened before the Labour Court and every labourer would be filing petitions and drawing the Official Liquidator to the Labour Courts for defending the case of the company. The purpose and the intention of the Act was that all such claim against the company which had been wound up would have to be filed before the Official Liquidator who was empowered to decide such claims. The petition was, therefore, dismissed. It has, however, been held that RC could withdraw the proceedings before the Labour Court and file the same before the Official Liquidator for appropriate reliefs.

It has been held that the following proceedings are not affected by [Section 446] : (a) a private sale outside the Court by public auction by a mortgagee [*Ranganathan* vs. *Govt. of Madras 1955. S.C. 604*]; (b) a defendant's plea of set-off or counter-claim in defence [*Andhra Paper Mills Co. Ltd.* vs. *Anand Bros. (1951) IM.L.T. 340*] ; (c) proceeding by persons out of jurisdiction in a foreign country [Re. *Voclain (foreign) Ltd. (1932) 2, Ch. 196*) ; (d) a claim petition by a third party where a company in winding-up has attached the property of a judgment debtor [*Selva Iyer* vs. *Madhura Mercantile Bank (1962) 32, Comp. Cas. 47*].

It may be noted that the proceedings for assessing a company to income-tax under the Income-tax Act are not legal proceedings and hence are not affected by [Section 446] Until the I T.O. makes an assessment order, he is not a creditor, and as such cannot prove his claim in the winding-up [*Tilak Ram & Sons (Private) Ltd*, vs. *Commissioner of Income-tax, (1964) 34 Comp. Cas 151*]. However, it has been held in [*Rele* vs. *Deshpande. (1967) 2 Comp. L.J. 210*] that the re-assessment proceedings by the Income-tax authorities cannot be commenced or continued without the leave of the Court.

It may further be noted that if a secured creditor realises his security without intervention of the Court, he will be outside the jurisdiction of the Court in winding-up. But where the secured creditor invokes the aid of the Court and takes any legal proceeding against the company within the meaning of (Section 446), it will be necessary for him to seek leave of the the Court [*Ranganathan* vs. *Government of Madras [Supra]*].

In the winding-up, Court shall have the jurisdiction to entertain or dispose of : (i) any suit or proceeding by or against the company ; (ii) any claim made by or

against the company including claims by or against any of its branches in India : (iii) any application made under (Section 391) by or in respect of the company ; (iv) any question of priorities or any other question of law or fact which may relate to or arise in the course of the winding-up of the company [Section 446 (2)]. Any such suit or proceeding pending in any other Court may be transferred to or disposed of by the Court in which the winding-up proceedings are taken [Section 446 (3)]. The provisions contained in sub-section (1) or (3) as aforementioned, shall not be applicable to any proceeding pending in appeal either before the Supreme Court or the High Court [Section 446 (4)]

Section 446 is designed to safeguard the assets of the company in winding-up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding-up Court itself "An evenhanded justice requires that the Court should have power to intervene at an early stage for the protection of the assets, and this power is given by (Section 446)".

The winding-up order operates in favour of all the creditors and contributories of the company as if it had been made on the joint petition of a creditor and of a contributory (Section 447).

Statement of Affairs : Where winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator by the Court, a statement as regards the affairs of the company in the prescribed form [From 57, Companies (Court) Rules, 1959] shall be delivered to the Official Liquidators. Such a statement shall have to be verified by an affidavit and shall contain particulars of (i) the assets of the company stating separately the cash balance in hand and at the bank, negotiable securities ; (ii) its debts and liabilities ; (iii) the names, residence and occupations of the creditors (secured debts being segregated from those considered unsecured) and in the case of secured debts the particulars of the securities given whether by the company or an officer thereof, their value and the debts on which they were given ; (iv) the debts due to the company and the names, and residences, and occupations of the persons from whom they are due (also estimated amount to be realised) ; and (v) such further or other information as may be prescribed or as the Official Liquidator may require [Section 454 (1)].

The aforementioned statement is required to be made and verified by one or more of the directors and by a person who, at the date of winding-up order or the appointment of the provisional liquidator, as the case may be, is the manager, secretary or other chief officer of the company. Also, it may be made by the following persons if the Official Liquidator so requires, subject to the directions of the Court : (i) who are or have been officers of the company ; (ii) who have participated in the formation of the company at any time within one year before the relevant date ; (iii) who are in the employment of the company or have been so within the said year and are, in the opinion of the Official Liquidator, capable of giving the information required ; (iv) who are or have been within the said year officers of, or in the employment of, a company which is, or within the said year was, an officer of the company to which the statement relates [Section 454 (2)].

The above-mentioned statement is required to be submitted within 21 days of the winding up order or the appointment of the provisional liquidator as the case may be or within such extended time, not exceeding three months, as may be fixed by the Official Liquidator or the Court for special reasons. The persons, preparing the statement and affidavit shall be allowed such costs and expenses incurred in connection therewith as the Official Liquidator may deem reasonable, subject to an appeal to the Court [Section 454 (3) & (4)].

Non-compliance with any of the requirements of Section 454, without a reasonable excuse, shall render the defaulter liable to be punished with imprisonment to the extent of two years or with a fine extending up to Rs. 100 per day during which the default continues or with both [Section 454 (5)].

The Court concerned may take cognizance of an offence, mentioned above, upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Criminal Procedure Code 1898 for the trial of summons cases by Magistrates [454 (5A)].

The statement of affairs must be open to inspection by any one stating himself in writing to be a creditor or contributory. Also he is entitled to a copy thereof or an extract therefrom. For both inspection and copy or extract, the prescribed fee is to be paid [Section 454 (6)].

[*Note* : The expression 'the relevant date' in a case where, a provisional liquidator is appointed, is the date of his appointment and in a case where no such appointment is made, the date of the winding-up].

Section 511A extends the provisions of Section 454 to every voluntary winding-up in the same way as they are applicable to a winding up by the Court For construing these provisions, references in the Section to (a) the Court shall be omitted ; (b) the Official Liquidator or the provisional liquidator shall be construed as references to the liquidator ; (c) the 'relevant date' shall be construed as references to the date of commencement of the winding-up

The afore-mentioned provisions of Section 454 are intended to enable the liquidator to have information as regards the affairs of a company, so that the liquidator may know something about the property and the assets of the company, the names, addresses and occupations of the creditors, the debts due to the company and the persons from whom they are due. The statement of affairs of the company is motivated to afford facility to the liquidator in his management of the company's affairs in discharging the company's obligations, realising, its assets, and distributing surplus assets (if any) among its members.

Official Liquidator's report (Section 455) : The Official Liquidator must, as soon as practicable after the receipt of the statement of affairs under Section 454 but, not later than six months from the date of the winding-up order or such extended period as may be allowed by the Court, or where the Court orders that no statement of affairs need be submitted as soon as practicable, after the date of the order, submit a preliminary report to the Court :

(a) as to the amount of capital issued, subscribed, and paid-up and the estimated amount of assets and liabilities, giving separately, under the heading of assets: particulars of : (i) cash and negotiable securities ; (ii) debts due from contributories ; (iii) debts due to the company and securities (if any) available in respect thereof ; (iv) movable and immovable properties belonging to the company ; and (v) unpaid calls ;

(b) if the company has failed, as to the causes of the failure ; and

(c) whether a further inquiry is desirable as to the company's failure, promotion or formation or the conduct of the business thereof.

If the Official Liquidator thinks, fit, he may make a *further* report or reports, stating the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its formation or promotion or by any officer of the company in relation to the company since the formation and any other matters which, in his opinion, it is desirable to bring to the notice of the Court. Such further report may lead to the public examination of a person or officer in accordance with Section 478 (Section 455).

A person ordered by the Court to be examined will be entitled to obtain a copy of the report of the Official Liquidator at his cost and to employ an advocate to enable him to explain or qualify any answer given by him. The person so charged may apply to the Court to be exculpated from any charges made or suggested against him and, if he does so, it shall be the duty of the Official Liquidator to appear on the hearing of the application and call the attention of the Court to any matters which appear to the Official Liquidator to be relevant [Section 478 (6) & (7)].

The Preliminary Report mentioned above shall be in Form No. 60 with such variations as may be necessary [Rule 135, the Companies (Court) Rules]

Appointment of Official Liquidator : In order that the debts and obligations of a company in liquidation may be satisfied, and the surplus assets distributed amongst the members according to their right to shares in such surplus assets, there must be some person to discharge these duties. The person who does all these is called the liquidator.

For the purpose of the Companies Act and in so far as it relates to the winding-up of a company by the Court, there must be attached to each High Court an Official Liquidator. He is appointed by the Central Government and is a whole-time officer, unless the Central Government thinks that there will not be sufficient work to justify a full-time appointment in which case a part-time officer may be appointed. The Official Receiver attached to a District Court for insolvency purposes, or if there is no such Official Receiver then such person as the Central Government may, by notification in the Official Gazette, appoint for the purpose, shall be the Official Liquidator attached to the District Court [Section 448 (1)]. Also, one or more Deputy or Assisant Official Liquidators may be appointed by the Central Government so as to assist the Official Liquidator in discharging his function [Section 448 (1-A)]. On a

winding-up order being made in respect of a company, the Official Liquidator *ex-officio* shall become the liquidator of the company [Section 449].

The legal position of an Official Liquidator is that he is a public servant and an officer of the Court. Such a position requires him to be honest and impartial and to act in the interests of all concern [*Ripon Press* vs. *Chetl 55 Mad. 180*]. He has such powers as are prescribed by Section 457. Section 462 requires him to render accounts to the Court. He is not a 'trustee', in the sense of the term, although he is sometimes described as such [*ex parte Watkin 1857, I Dk. E. 130*]. He stands in a fiduciary relationship with the company he is appointed for [*Black and Co., 1872, 8 Ch. 254*]. He is debarred from making any secret profit If he abuses his power and betrays his position, he shall be liable to make good any secret profits that he may have made as well as be liable to be removed by the Court. Thus, he is a trustee in the sense that he must act in the interests of the company, the creditors and the contributories. He should not act in his own interest [*Silk Stone & Haigh Moor Co. 1900, I Ch 167.*]

Appointment and Powers of Provisional Liquidator : After a winding-up petition has been presented, but before a winding-up order has been issued, the Court may appoint the Official Liquidator as the provisional liquidator. But prior to such an appointment being made, the Court is bound to give notice to the company and also a reasonable opportunity to make its representation. The Court may, however, waive this notice for special reasons which must be recorded in writing. The provisional liquidator will be vested with powers of a liquidator, unless they are limited or restricted to any extent by the appointing Court. On winding-up order having been made, the Official Liquidator ceases to be a provisional liquidator and becomes the liquidator [Section 450].

Generally, provisional liquidator will not be appointed unless a strong case is made out by showing the necessity for such an appointment and unless it is proved that the property of the company needs be taken possession of immediately [*In re Day Docks Co-operation of London. 1888 39 Ch. D. 309* : *East Punjab Pictures* vs. *Jhabar Mal 1940 East Punjab 139*]. His appointment is temporary and continues till the appointment of the Official Liquidator. The reason for his temporary appointment is that there must be some persons to take proper custody of the company's property so that its debts and obligations are met with equitably and in accordance with the provisions of the Act and fraudulent preference is prevented. [*In re Day Docks Co-operation, supra*]. As against an order of the Court by which a provisional liquidator is either appointed or not, an application for premission to move the Supreme Court cannot lie, as this order, being only an interlocatory order, is not a final order [*Jhabar Mal* vs. *The Punjab Pictures Ltd.. 1949. 99 Comp. Cas. 172*].

A liquidator may be removed and replaced by another, if the Court is satisfied that it is for the general advantage of those interested in the assets of the company [*Re Atlom Eyton Ltd (1887) 36 Ch. D 209*].

Powers of Liquidator : A liquidator has the following powers which he must exercise *with the sanction of the Court* : (i) to institute or defend any suit, prosecution

or legal proceeding, civil or cirminal, in the name and on behalf of the company (ii) to carry on the business of the company, so far as may be necessary for its beneficial winding-up, (iii) to sell movable and immovable property and actionable claims of the company by public auction or private contract in whole or in parcels, (iv) to raise any money required, on the security of the assets of the company, (v) to do such other things as may be necessary for the winding-up of a company and the distribution of its assets. [Section 457 (1)].

The Court may order that the liquidator can exercise the above powers without the sanction or intervention of the Court. However, in such cases, the liquidator, in exercising the aforementioned powers, will be subject to the control of the Court (Section 458).

The following is a list of powers which he can exercise without the consent of the Court—(i) do all acts and to excute deeds, receipt and other documents for and on behalf of the company and use for this purpose the company's seal ; (ii) to inspect the records and returns of the company on the files of the Registrar without payment of any fee ; (iii) to prove rank and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in his insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors ; (iv) to draw, accept, make and endorse bills of exchange, hundi or promissory note in the name and on behalf of the company as if these have been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business ; (v) to take out in his official name, letters of administration to any deceased contributory and do any other acts needed for obtaining payment of money due from the contributory or his estate and (vi) to appoint an agent to do any business which he himself is unable to do (Section 457 (2)].

All the above-mentioned powers, exercisable by the liquidator, are subject to the control of the Court Any contributory or creditor may apply to the Court in regard to the exercise of the powers conferred on the liquidator [Section 457 (3)].

A liquidator in a voluntary winding-up, with the sanction of a special resolution in case of members' winding up, and, or Court or committee of inspection or (if there is no such committee) of a meeting of the creditors in creditors' voluntary winding up, can exercise powers specified under clauses (a) to (d) of Section 457 (1) [*i.e.* powers (i) to (iv) aforementioned which are exercisable with the sanction of the Court [Section 512 (1) (a)]. The exercise of these powers, however, will be subject to the control of the Court [Section 512 (2)]. The liquidator may (i) without the sanction referred to in Section 512 (1) (a), exercise any of the other powers given by the Act to the liquidator in a winding up by the Court ; (ii) exercise the power of the Court, under the Act, of settling a list of contributories which shall be *prima facie* evidence of the liability of the person named therein to be contributories (iii) exercise the powers of the Court of making calls ; (iv) call general meetings of the company to obtain the sanction of the company by ordinary or special resolution, as the case may require, or for any other purpose he may think fit [Section 512 (1) (b) to (e)].

A liquidator may (a) with the sanction of the Court when the company is being wound up by or subject to the supervision of the Court and (b) with the sanction of a special resolution of the company in the case of the voluntary winding up : (i) pay any classes of creditors in full ; (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent ; ascertained or sounding only in damages against the company or whereby the company may be rendered liable or (iii) compromise any call or liability to call, debt and liability capable of resulting in a debt, and all claims, present or future, certain or contingent, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way concerning or affecting the assets or liabilities or the winding-up on such terms and conditions as may be agreed, and take any security for the discharge of any such call debts, liability or claim, and give a complete discharge in respect thereof.

In the case of voluntary winding-up, the powers aforementioned exerciseable by the liquidator are subject to the control of the Court. Any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any such power [Section 546 (2) and (3)].

The Supreme Court may make rules under Section 643 as regards the manner in which the liquidator should exercise powers under clauses (ii) and (iii) of Section 546 (1) without the sanction of the Court.

Duties of Liquidators : The following are the main duties of a liquidator or provisional liquidator, as the case may be, as contemplated by the Act.

(1) To take into custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled (Section 456). For this purpose, the liquidator or the provisional liquidator, as the case may by, may by writing request the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effect or actionable claims or any books of account or other documents of the company may be found, to take possession thereof. Thereupon, the Chief Presidency Magistrate or the District Magistrate may after having given to any party such notice as he may think fit, take possession of them and deliver the same to the liquidator or the provisional liquidator [Section 456 (1A)].

For securing compliance with the provisions of Section 456 (1A), the Magistrate afore-mentioned may take or cause to be taken such steps and use or cause to be used such force as he considers necessary [Section 456 (1 B)]. All the property and the effects of the company shall be deemed to be in the custody of the Court as from the date of the winding up [Section 456(2)].

(2) To submit a preliminary report to the Court giving the particulars mentioned in Section 455.

(3) To keep, in the manner prescribed, proper books in which he shall cause entries or minutes to be made of proceedings at meeting and of such matters as may be prescribed (Section 461). Rule 286 of the Companies (Court) Rules, 1956 prescribes

that the liquidator should maintain different books for various purposes. The forms of the books have also been prescribed. In addition, the rule requires that registers should be maintained to keep a record of several routine matters, *e.g.*, receipt and despatch of letters, remittances received, *etc.* Where the liquidator finds that the books of account as have been maintained by the company are incomplete, it is obligatory for him to have the same completed and brought up to date.

Audit of Liquidator's Accounts : As has been stated earlier, Section 462(1) prescribes that the liquidator shall, during his tenure of office, present to the Court an account of his receipts and payments. Rule 98 of the Companies (Court) Rules requires the Official Liquidator to file his accounts with the Court twice a year, one made up to 31st March and the second up to 30th September, within 3 months of the closing of the accounts. The account should be drawn up in Form 144 of the Companies Court Rules.

Section 462(3) prescribes that the Court shall cause the account to be audited as it thinks fit. In consonance therewith, Rule 302 of the Companies (Court) Rules provides that the account shall be audited by one or more Chartered Accountants appointed by the Court or, if the Court so directs, by the Examiner of the Local Fund Accounts of the State concerned The audit shall be a complete check of the accounts of the Official Liquidator and of each of the companies in liquidation in his charge. Though the certificate to be appended to this account has not been prescribed it has been mentioned that the auditors shall check them with reference to books of account and give his observations and comments on the accounts. He also must forward a certificate of audit as well as a copy thereof to the Registrar and another copy to Official Liquidator (Rule 303). A copy of the accounts must be filed and kept by the Court and the same shall be open to inspection by any creditor, contributory or any person interested [Section 462(4)] Section 462 (5) provides that the liquidator shall cause the account when audited, or a summary thereof to be printed and shall send a printed copy of the accounts or summary by post to every creditor or to every contributory. But the Court is empowered to dispense with the compliance with the provision.

Information as to Pending liquidations : Section 551 (1) prescribes that when the winding up of a company is not concluded within one year after its commencement the liquidator shall, unless exempted from so doing by the Central Government, within two months of the expiry of such year and thereafter, until the winding up is concluded, at intervals of not more than one year or at such shorter interval, if any, as may be prescribed, file a statement in Form No. 148 (Rule 311, Companies (Court Rules). The statement shall contain necessary particulars and be audited by Chartered Accountant. These particulars must be with respect to the proceedings in and position of the liquidation. In the cases of winding up being carried on by or under the supervision of the Court, the aforesaid statement is to be filed in the Court but in the case of a voluntary winding up, it is to be filed with the Registrar. But an audit is not necessary in case of winding up by the Court, where provisions of Section 462 apply.

Simultaneously with the filing of a copy of the statements of account in the Court, a copy shall be filed with the Registrar [Section 551 (2)]. Any person stating

himself in writing to be a creditor or contributory is entitled at all reasonable times on payment of the prescribed fee to inspect the foregoing statements of account and to receive a copy thereof or an extract therefrom [Section 551(3)].

(4) To summon meeting of the creditors and contributories in the manner hereinafter stated under the head "committee of inspection" [Section (464)].

(5) To pay the moneys, received by him as liquidator, of any company into the public Account of India in the Reserve Bank of India (Section 552) and not into his private banking account (Section 554). But the voluntary liquidator is to pay the moneys into a scheduled bank to the credit of "Liquidation Account of X & Co. Ltd /X Cr. Private Ltd /X & Co." (Section 553).

(6) To pay forthwith dividends payable to creditors, which had remained unpaid for 6 months after the date on which they were declared and assets refundable to any contributory, which have remained undistributed for six months after the date on which they become refundable into the Public Account of India Companies Liquidation Account in the Reserve Bank of India in a separate account called "the Company's Liquidation Account" [Section 555(1)].

(7) To summon meeting at such times as the contributories, by resolution, direct, or whenever requested to do so by not less than one-tenth in value of creditors or contributories, as the case may be [Section 460(3) (b)].

(8) To obey directions given by resolutions of the creditors or contributories or by the committee of inspection, in the administration of the assets of the company and the distribution thereof among its creditors [Section 460 (1)] Note that any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection [Section 460(2)].

(9) To submit accounts for inspection to committee of inspection [Section 465(2)].

(10) To account for secret profit made by him.

(11) To be impartial between creditors, members, *etc.*

(12) To obey the directions of the Court with regard to disposal of books of the company (Section 550).

(13) To file periodical report with the Court (Section 551),

(14) To notify on invoices that the company is in liquidation (Section 547)

(15) To duly observe all the requirements of the Act [Section 463 (1)].

(16) To participate in public examination of directors, *etc.* (Section 481),

(17) To forward dissolution order to Registrar within 30 days from the date thereof [Section 481 (2)].

Committee of Inspection : Either at the time of making an order of the winding up of a company or at any time thereafter, the Court may direct that a committee of

inspection shall be appointed in order to act with the liquidator. In the event of such a direction being given, the liquidator is bound to convene a meeting within 2 months from the date of such direction, of the creditor (ascertained from the company's books and documents) with a view to determine who are to be members of the committee [Section 464 (1)]. Within 14 days from the date of the creditors' meeting or such further times as extended by the Court, the liquidator shall convene a meeting of the contributories so as to consider the decision taken at the creditors' meeting in regard to the membership of the committee. This decision may either be altogether rejected or accepted with or without any modifications [Sub-section (2)]. If the decision taken at the first meeting is either rejected or accepted with modifications, the liquidator shall be duly bound to seek the Court's direction as regards the composition [Sub-section (3)].

A Committee of inspection shall consist of not more than 12 members, being the creditors and contributories or their attorneys. The proportions of the members of the committee, if not decided upon by the creditors and contributories themselves, shall be determined by the court. Its function is to assist the liquidator and to inspect his accounts. The committee must meet at such times as it may from time to time appoint ; the liquidator or any member may also summon a meeting as and when he thinks necessary. The quorum is 1/3rd of total number of members or two, whichever is higher. The committee acts only if there is a quorum and by a majority members present. A member of the committee ceases to act ; (i) when he resigns by notice in writing signed by him and delivered to the liquidator ; (ii) when he is adjudged an insolvent or compounds or arranges with his creditors ; (iii) when he is absent from five consecutive meetings of the committee without leave of those members who together with himself, represent the creditors or contributories ; (iv) when he is removed by ordinary resolution of which 7 days' notice has been given by the creditors, if here presents the creditors, or by the contributories, if he represents the contributories.

If any vacancy occurs in the committee, the liquidator must immediately summon a meeting of the creditors or contributories, as the case may be, to fill the vacancy unless he thinks it unnecessary to fill in the vacancy and obtains the leave of the court in regard thereto (Section 465). A member of the committee of inspection is in fiduciary position and cannot buy any of the company's property from the liquidator [*In re Bhamer* (1937) Ch. 489] Similarly, where a member of the committee purchases the property of a company, such a purchase was held to be bad, inasmuch as he occupied a fiduciary position in relation to the company (*Durga Prasad* vs. *Official Liquidator, Benares Bank Ltd., A.I.R. 1959 All. 196*).

Control exercisable by Central Government over Liquidator : The Central Government, according to the provisions contained in Section 463, is empowered to take cognisance of the conduct of the liquidator of companies which are being wound up by the Court. If, on the application of any creditor or contributory, it is found that a liquidator is not faithfully performing the duties and fully observing the requirements imposed on him by the Act, rules or otherwise the Central Government must enquire into the matter and take such action as it may think expedient. Also, the

Central Government may at, any time (a) require any liquidator to answer any enquiry in relation to any winding up in which he is engaged ; or (b) direct a local investigation to be made into the books and vouchers of the liquidator ; or (c) apply to the Court to have him examined on oath concerning the winding up.

General Powers of the Court in the Case of Winding up by Court : (a) Under Section 442, after an application for winding up has been made but before an order for winding up is made, the company may apply for stay of suits or proceedings pending against the company in the Supreme Court or in any High Court. Such an application is required to be made either to the Supreme Court or to the High Court, as the case may be. In all other cases, the application is to be made to the Court having the jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding ; and the Court to which the application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit. This Section being wide in scope, its provisions would seem to apply to all kinds of proceedings irrespective of whether they are civil, criminal or revenue and also to proceeding in foreign Courts. [*In re. Vocation (foreign) (1932) 2 Ch. 196*]. This application for stay is to be made upon notice to all the parties to the suit or proceedings sought to be stayed. (Rule 105, the Companies (Court Rules).

It may be observed that Section 442 is applicable only until a winding up order is made. As soon as the order of winding up is made, Section 446 comes into operation. It provides that as soon as the winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceedings can be commenced Also, if any suits or proceedings are already pending, these cannot be proceeded with against the company without the leave of the Court

(b) The Court may, at any time after making a winding-up order, on the application of the Official Liquidator or any creditor or contributory, and on being satisfied that the winding-up ought to be stayed make an order staying the winding-up proceedings either altogether or for a limited period on such terms and conditions as the Court thinks fit (Section 466).

(c) As early as possible after making the winding up order the Court shall settle a list of contributories and have the power to rectify the register of members in all cases where rectification is required to be made in pursuance of the Act and shall cause the assets of the company to be collected and applied in discharge of its liabilities (Section 467).

(d) The Court may, at any time after making a winding-up order, require any contributory or trustee, receiver, banker, agent, officer or other employee of the company to pay, deliver, surrender or transfer any property, books, money and papers in his custody or under his control to which the company is *prima facie* entitled (Section 468).

(e) After making the winding-up order, the Court may call upon a contributory for the time being on the list of contributories to pay any debt due to the company from him or from the estate of the person whome he represents, exclusive of calls. While doing so, the Court :

(i) in the case of an unlimited company, may allow to the contributory, by way of set off, any money to him or to the estate he represents, from the company or any independent dealing or contract with the company but not money due to him as a member of the company in respect of any dividend or profit ;

(ii) in the case of a limited company, may make the like allowance to any director or manager whose liability is unlimited or to his estate ; and

(iii) in the case of both limited and unlimited companies, when all the creditors have been paid in full, may allow a set-off of any money due, on any account whatever to a contributory from the company against any subsequent calls due from him (Section 469).

(f) After a winding-up order, and either before or after the Court has ascertained the sufficiency of the assets of the company, the Court may make a call on all or any of the contributories for the time being on the list of contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the cost, charges and expenses of the winding-up and for the adjustment of the rights of contributories among themselves, and make an order for payment of any calls so made. While doing so, it may take into consideration the probability that some of the contributories may, partly or wholly, fail to pay the calls (Section 470)

(g) The Court may order any contributory or other person from whom any money is due to the company, to pay the money into the public account of India in the Reserve Bank instead of to the liquidator. All moneys, bills, *hundies*, notes and other securities so paid or delivered to the Reserve Bank in the course of the winding-up by the Court will be subject to the orders of the Court (Section 471 and 472).

(h) The Court may fix a time for the creditors to prove their debts or claims and may exclude those not proving within the time so fixed from the benefit of any distribution made, before the debts or claims are proved (Section 474).

(i) The Court has the duty to adjust the rights of the contributories among themselves and distribute surplus among the persons entitled thereto (Section 475). In the event of the assets being insufficient for paying off the liabilities of the company, the Court has the direction to order costs, charges and expenses incurred in a winding up to be paid in such order of priority *inter se* as the Court thinks just (Section 476). The Court may summon before it, any time after the appointment of a provisional liquidator or the making of a winding-up order, any officer of the company, or person known to have, or suspected of having, in his possession any property, or books or papers of the company, or known or suspected to be indebted to the company, or deemed capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers or affairs of the company [Section 477 (1)] Also, the Court may examine them on oath [S. 477(2)]. Section 477(5) & (6) invests the Court with the necessary authority to enforce the recovery of debts of the company or of the property belonging to the company which is in possession of the officer or

person so summoned. The debt or property is to be made over to the provisional liquidator or the liquidator, as the case may be. Such an order is to be executed in the same manner as a decree under the Code of Civil Procedure.

(j) The Court may, after considering the report of the Official Liquidator that in his opinion a fraud has been committed by any person in the promotion or formation or by any officer in relation to the company since its formation, direct such person or officer to attend before it and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to the conduct and dealings as an officer thereof [Section 478 (1)].

The Official liquidator shall take part in such examination and for the purpose may take such legal assistance as may be sanctioned by the Court. Any creditor or contributory may also take part either personally or through an advocate attorney or pleader entitled to appear before the Court. The Court may put such question to the person examined as it thinks fit and the person examined will be bound to answer all such questions. Notes of such examination shall be taken down in writing and read over to or/by, and signed by, the person examined and such notes may thereafter be used in evidence against him, and can be inspected by any creditor or contributory at all reasonable times. The Court may adjourn the examination from time to time (Section 478).

(k) If a contributory is suspected of planning to quit India or otherwise to abscond or to remove or conceal any of his property for evading payment of call or evading examination, the Court may cause the contributory to be arrested and safely kept until such time as the Court may order, and, his books and papers and movable property to be seized, safely kept until such time as the Court may order (Section 479),

Final Winding Up : Under Rules 281 of the Companies (Court) Rules, 1959, as soon as the affairs of the company have been fully wound up, the Official Liquidator in a winding-up by the Court shall file his final account [in Form No 146] into the Court and apply for orders as to dissolution of the company subject to his final account being passed. The application must not be set down for hearing until the auditor completes the audit of the final account and files his certificate in relation thereto. Rule 282 provides that, upon the hearing of the application, the Court may, after hearing the Official Liquidator and any other person on whom notice may have been served by the Court, and upon perusing the account as audited, make such orders as it may think fit as to the dissolution of the company, the application (subject to the provision of the Act) of the balance in the hands of the Official Liquidator or the payment thereof into Companies Liquidator Account in the public account of the Reserve Bank and the disposal of books and papers of the company and of the Liquidator.

After the liquidator has filed the statement as aforementioned, showing the affairs of the company to have been completely wound up or when the Court is of the opinion that the liquidator cannot proceed with the winding-up of the company for funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution should be made, then the

Court shall make an order that the company be dissolved from the date of the order [Section 481 (1)]. A copy of the order must be forwarded within 30 days from the date of the order by the liquidator to the Registrar who shall enter in his books a minute of the dissolution of the company and the company shall be dissolved accordingly [Section 481 (2)].

Effect of Dissolution : "The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceeding being taken against promoters, directors, or officers of the company to recover money or property due or belonging to the company, or to prove a debt due from the company. Where, the company is dissolved, the statutory duty of the liquidator towards the creditors and contributories is gone ; but if he has committed a breach of his duty to any creditor by distributing the assets without complying with the requirements of the Act, he is liable to damages to the creditor". (Halsbery's Laws of England, 3rd Edn. Vol. VI. Page, 370) ; *Kanhaiya Lal Bhargava* vs. *Official Liquidator* (1965) 35 *Comp Cas* 340.

"*Winding up and dissolution*" : These two situations differ from each other in following respects :

(i) Winding-up preceds dissolution, whereas dissolution follows the former. In the former case, the company still remains in existence, while the latter implies that the company is not existent any more (*Employer's Liabilities Assurance Corporation* v. *Sedwitck* ... ...*Co.*, 1927 *A.G.* 95).

(ii) Winding-up denotes and involves the liquidator's acts of realising and collecting the assets of the company, satisfying its debts and obligations, distributing its capital and surplus assets among the members of the company. But the dissolution comes after the liquidator has done all this in the winding-up ; ordinarily it implies that the company's affairs have been completely wound up and that the company is no longer in existence [*Kanhaiya Lal Bhargava's Case* (*1965*) 35 *Comp. Cas. 340*].

(iii) The liquidator, in the case of a winding up, is the representative of the company on behalf of which he is appointed, but on dissolution he cannot any more represent a person not in existence. In the first case any creditor can prove a debt due to him from the company, whereas it is not possible to do so after dissolution (*Kanhaiya Lal's Case Supra*).

SELF-EXAMINATION QUESTIONS

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper. The Answers to these questions are not required to be written or to be submitted for evaluation. Answers are given at the end.

1. Is 'winding-up' of a company synonymous with its 'bankruptcy' ?
2. Can a company which is unable to pay its debts, be declared bankrupt ?
3. How long does a company continue its corporate existence ?
4. What are, broadly, the methods by which the dissolution of a company can be brought about ?

5. Is there any difference between a defunct company and a bankrupt company ?
6. Who can apply for the restoration of a defunct and a dissolved company ?
7. What is the limitation period for an application in either case ?
8. Acts done after dissolution but before revival (i) can be, (ii) cannot be validated by the order of revival. Which is correct ?
9. What about the acts done by a defunct company till its revival—are those validated ?
10. How many modes of winding-up can you conceive of ?
11. Is it necessary to appoint liquidators in all modes of winding-up ?
12. In administering the assets of the company, the liquidators must first apply them in paying off the debts having statutory priority, next in paying off the shareholders according to their right *inter se* and then distribute the surplus, if any, among the creditors in their order. Is this order of disposal of company's assets by liquidators correct ?
13. Can a District Court have the jurisdiction in winding-up matters ?
14. Can the following persons be called contributories to a company now under liquidation ?
    (a) One who has bought shares 5 months ago ;
    (b) One who has sold the shares 6 months ago ;
    (c) One who has sold the shares 1½ years back ;
    (d) One who has sold the shares 2½ years back ;
15. Some applicants consented to become shareholders of a company on the condition that their suggestions would be included in the memorandum and articles of association. Their suggestions were not, however, carried out by the promoters. But the applicants signed the usual applications for shares which were allotted to them and thereby became shareholders of the company. Their names were included in the list of contributories. Could they object to this inclusion ?
16. What is the extent of the liability of a contributory in the case of a company (i) Limited by shares ; (ii) Limited by guarantee ; and (iii) Limited by guarantee but having a share capital ?
17. The law states that the liability of a contributory shall create debt accruing due from him at the time even when his liability commenced but payable at the time specified in calls made on him for enforcing the liability. (a) What do you understand by this provision of law ? (b) What is the real impact of this provision ?
18. The liquidator of a company in liquidation finds one X's name in the register of members and calls upon X to contribute his share. X contends that there was an agreement with the directors that he should be excluded from the liability to contribute. Can his contention be upheld ?

19. The liquidator makes two lists of contributories—'A' list and 'B' list. Who are included in these lists ?

20. The liquidator of a company demanded from a member the uncalled amount on his share. His name was included in 'B' list as his shares were forfeited prior to the winding up. But the liquidator did not ask the present members to contribute to the full extent of the unpaid amount of their share money. In the circumstances, could the first-mentioned member avoid payment ? [*Parasram Brij Kishor* vs *Fagmon Trading Syndicate, A.I.R* (1936) *Lah.* 226].

21. What is a compulsory winding-up ?

22. What is the effect of the death of a contributory (a) when the contributory is an individual and (b) when the contributory is a body corporate ?

23 Is the Court bound to wind up a company in any of the circumstances specified in Section 433 ?

24. X & Co. Ltd. put a steamer and two flats into operation for carrying on its business. During World War I, the Government acquired the flats and the company could not replace them immediately as the prices were prohibitive. Consequently, the company had to suspend its business for more than a year. A petition for winding-up was made to the Court. (a) Could the Court grant the petition ? *Muralidhar* vs. *Bengal Steam Ship Co Ltd. 1924 I.L.R. 47 Cal 648*] (b) If, however, X & Co. Ltd. failed to resume its business for five years and the prospectus also seemed gloomy, would the Court order the winding-up of the company ? [*Rupa Bharti Ltd.* vs. *Registrar of Companies 1969 I Comp. L.J. 296*].

25. Will the company be deemed to be unable to pay its debts in the following circumstances :

(a) If a creditor of a company to the extent of Rs. 400 makes a written demand from the company for the repayment of the amount and the company has for 3 weeks neglected to pay or otherwise satisfy him.

(b) If the amount of the debt had been Rs 500 and the company had been negligent in paying or satisfying the creditor for 2 weeks.

(c) If the amount of the debt demanded was Rs. 500 and the company did not pay during the statutory period as there was a *bona fide* and reasonable dispute as to the amount of debt.

(d) As against the petitioner's demand if the company puts forward a dispute just to cloak its inability to pay his debt.

(e) If executive or other process issued of a decree or order of any court in favour of a creditor is returned unsatisfied partially ?

26. A company resisted a petition for winding-up on the ground that it was able to pay its debts since its liabilities amounted to Rs. 8,72,484 whereas, its assets were worth Rs. 10,79,100. On the evidence led in, it was found that those assets included building and machinery. Without the building

and machinery, the company could not carry on business. If their value is excluded, only a sum of Rs. 3,00,000 would be available to discharge the debts. Would the company succeed (*Sree Shanmugar Sugar Mills* vs. *Dharmaraja Nadar, A.I.R. 1970 Mad 203*).

27. A company was incorporated for the purpose of manufacturing tubular furniture, children's toys *etc.* It spent a substantial part of its subscribed capital on fixed assets. It borrowed a sum of Rs. 3 lakhs from a bank for providing working capital. As the company was unable to pay back this loan otherwise, the stock-in-trade, plant and machineries of the company had to be sold out in execution of a decree obtained by the bank. Would it be just and equitable to wind up the company in the circumstances ? [*Davco Products Ltd* vs *Rameshwarlal A.I.R. 1954 Cal 1954*].

28. Suppose there has been a loss of substratum but the members do not ask for winding-up of the company. The company carried on, in the circumstances, with the other objects of the memorandum. Would it be proper?

29. A majority of the shareholders at a meeting is in favour of winding-up On this basis, the company presents a petition for its winding up. Can the Court pass an order for winding up ?

30. Can the following persons file a petition for compulsory winding-up of a company ?

    (a) A secured creditor

    (b) A debenture-holder

    (c) A trustee for debenture-holders

    (d) A contingent or prospective creditor

    (e) A contributory when the number of members has fallen below the statutory minimum.

    (f) A Registrar on all grounds mentioned in Section 483.

    (g) A Registrar on the permissible grounds mentioned in Section 433 without prior sanction of the Central Government.

31. A transfer was executed, stamped and dated in June, 1967. The company registered it only in October, 1968 A contributory presented a petition in December. 1968 for winding-up of the company. Would the petition be sustainable ? (*Re Gatiaparde Ltd (1969) 2 All E.R. 334*).

32. What is the date of commencement of winding-up by Court :

    (a) where a resolution has been passed by the company for voluntary winding-up before the presentation of petition for winding-up by Court ;

    (b) where such a resolution for voluntary winding-up has not been passed ?

33. Does the winding-up order constitute a notice of discharge to the officers and employees of the company ?

34. According to Section 446, when the winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding can be commenced or if pending at the date of the order, shall be proceeded with against the company except by leave of Court and subject to terms imposed by it. Does this provision affect the following transaction :

(a) A private sale outside the Court by public auction by a mortgagee ;

(b) A defendant's plea of set-off or counter-claim in defence ;

(c) Proceeding by persons out of jurisdiction in a foreign country ;

(d) A claim petition by a third party where, a company in winding-up has attached the property of a judgment-debtor ;

(e) Proceedings for assessing a company to income-tax under the Income-tax Act ?

35. Can re-assessment proceeding by the income-tax authority be commenced or continued without leave of the Court ?

36. When can a secured creditor be outside the jurisdiction of the Court in winding up ?

37. An official liquidator has been appointed as provisional liquidator by the Court. In the circumstances, (a) what should the company do and (b) within what time-limit ?

38 If the company does not discharge the duty referred to in Question 37, can it escape punishment ?

39. Why is it necessary for an official liquidator to be honest and impartial and to act in the interests of all concerned ?

40. (a) What is the tenure of official of a provisional liquidator ?

(b) Is a provisional liquidator invariably appointed ?

41. Of the propositions comprised in the following statements, state which is correct :

(a) The Court (i) may, (ii) may not, order for the appointment of committee of inspection to act with the liquidator.

(b) The said committee may consist of (i) 12 members (ii) any number not less than 12 members (iii) any number not more than 12 members.

(c) Member of the committee are to be determined (i) only by the creditors at their meeting (ii) only by the contributories at their meeting.

(d) In case of dispute as to the members of the committee of inspection between creditors and contributories, (i) the liquidator can resolve it (ii) the Court can resolve it.

(e) The quorum for the committee is (i) 1/3rd, (ii) 1/4th, (iii) 3/4th of the total number of members (iv) or 2 whichever is higher ;

(f) Casual vacancy (i) need not be, (ii) need be, filled in.

ANSWERS :

(1) No. (2) No. (3) Until it is dissolved according to law ; (4) By getting the company's name struck off the register through Registrar, by order of Court or under Section 396 or by winding-up ; (5) Yes ; (6) Company or any creditor or member of defunct company ; liquidator or other person appearing to the Court to be interested in case of dissolved company ; (7) 20 years, in case of defunct company and 2 years in the other ; (8) (ii), (9) Yes . (10) Three ; (11) Yes ; (12) No ; (13) Yes, if the company has a paid up capital of less than Rs. 1 lakh ; (14) (a). Yes ; (b) Yes ; (c) No ; (d) No ; (15) No ; (16) (i) Amount remaining unpaid on his shares ; (ii) Amount undertaken to be contributed ; (iii) Guaranteed amount *Plus* the amount remaining unpaid on his shares ; (17) (a). The liability of a contributory is a debt but it becomes due only when a call is made ; (b). To give the liquidator a new cause of action which the company might not have ; (18) No ; (19) Present members in 'A' list & past members in 'B' list ; (20) Yes ; (21) Winding-up at the order of the Court. (22) (a) Liability devolves on legal representative ; (b) Liquidator to be the contributory ; (23) No ; (24) (a) No—indication as to company's non-intention to start business being absent ; (b) Yes. (25) (a). No ; (b). No ; (c). No ; (d). Yes ; (e) Yes ; (26) No—The test being whether the existing liability would be paid by it while continuing to carry on as a company ; (27) Yes—loss of substratum ; (28) Yes. (29) No, because special resolution essential. (30) Yes (a), Yes ; (b) Yes ; (c) ; (d). No, without the leave of the Court being obtained, (e), Yes (f) No—Section 433 (a) being excepted ; (g) No ; (31) No, as the contributory had not held the shares for 6 months during 18 months vide [Section 439 (4)] (b) ; (32) (a). Date of the resolution ; (b). Date of presentation of the petition for winding-up ; (33) Yes, except when company's business is continued ; (34) No ; (35). If he realises his security without Court's intervention. (37)(a). Delivery of the statement of affairs in prescribed form to the Official Liquidator (b) Within 21 days of the appointment ; (38) No ; (39) Because of his being a public servant and an officer of the Court ; (40) (a). From the presentment of the petition till the making of the winding-up order ; (b) No, except in urgent necessity ; (41) (a). (i) ; (b). (i) & (ii) ; (c). Both ; (d). (e). (i) & (iv) ; (f) Both.

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STUDY MATERIAL

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FINAL COURSE (N)
COMPANY LAW
STUDY—V

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Prescribed Reading : *"Lectures on Company Law"* by S. M.Shah ; 17th Edition ; *Indian Company Law* by Avtar Singh, Latest Edition.

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Voluntary Winding up

The object of a voluntary winding-up is to enable the members and creditors to settle their affairs among themselves without seeking the assistance of the Court but they may apply to the Court for any directions or orders if and when necessary (Section 518). A voluntary winding-up does not, necessarily, imply that the company's business has ceased since such a winding-up also may be necessary in the case of reconstruction or amalgamation of a company.

A company may be wound-up voluntarily under Section 484, according to the following procedures :

(a) *By passing an ordinary resolution at a general meeting in any of the following circumstances* : (i) when the period (if any) fixed for the duration of the company by its Articles has expired, or (ii) when the Articles provide for the dissolution of the company on occurrence of an event and the event has occurred *e.g.*, if a company is formed to construct a particular bridge, and the same has been built.

(b) *By a special resolution* : When the company for any reason which need not be disclosed, decides that it should be wound up voluntarily. A company may be prosperous, yet it may desire to wind up its affairs as a matter of convenience. It can do so if it passes a special resolution to that effect.

The members of a company cannot be divested of their right to pass a resolution calling for a voluntary winding up by including in the Articles a special provision in this regard, because such a provision would be repugnant to the express provisions of this Act. Notices of the meeting, where it is intended to propose an ordinary or a special resolution, as the case may be, must be given, and the meeting should be held in the manner laid down by the Act and the Articles of the company. Upon the pasting of a resolution for voluntary winding up, the company must, within 14 days thereof, give notice of the resolution by advertisement in the Official Gazette, and also in some newspaper circulating in the district where the registered office of the company is situated - (Section 485). A printed or typewritten copy of every winding up resolution passed in pursuance of Section 484 (duly certified under the signature of an officer of the company) must, within thirty days after the passing thereof, be filed with the Registrar who shall record the same (Section 192).

Commencement of Voluntary Winding-up :

Voluntary winding-up is deemed to have commenced at the time when the resolution for the voluntary winding-up is passed (Section 486). Even if the company is subsequently wound up by the Court, the commencement of the winding-up would be taken to be as from the date of the passing of the resolution (Section 441).

Effects of voluntary winding-up : With the commencement of voluntary winding-up, the following situations arise :

(i) The company ceases to carry on its business except for the purposes of beneficial winding of such business (Section 487). It still maintains its corporate

personality and its corporate power, until it is dissolved (Section 487). This is so even if the Articles provide to the contrary (*Hari Prasad Jayantilal & Co. v. I.T.O. Ahmedabad A. I. R. (1966) S. C.* 1481). The liquidator represent the company in liquidation and he functions as its agent for purposes of winding-up *Official Liquidator v. Commissioner of Income Tax (1971) 41 Comp. Cas. 226.*

(2) Any transfer of shares made without the sanction of the liquidator is invalid and any alteration in the status of the members made after the commencement of the winding up is void (Section 536).

(3) On the appointment of a liquidator under Secion 400 or 502, as the case may be, the powers of the directors, or managing or whole time director, or manager cease except in so far as the company in general meeting or liquidator, may sanction that the same be continued or for the purpose of giving notice of liquidator's appointment to the Registrar under Section 493. In the event of a creditors' winding up, the powers of directors cease except in so far as the Committee of Inspection, or if there is no such Committee, the creditors in general meeting may sanction that the same may be continued (Sections 491 & 505).

(4) Every invoice, order for goods, or business letter issued by or on behalf of the company or a liquidator or a receiver or manager, in which the company's name appear must contain a statement that the company is being wound up (Section 547).

(5) As to whether a voluntary winding-up discharges the servants of the company, it would depend upon whether the business of the company has ceased or is being continued. Thus, it would depend on the facts of each case. A voluntary winding-up coupled with immediate cessation of the company's business has been held to operate as a dismissal of the company's servant's (*Reigate v. Union Mfg. Co.* (1918) I. K. B. 592 (Ch.)].

(6) Suits and other legal proceedings against the company are not automatically stayed but an application may be made by the liquidator or any creditor or contributory to the Court to determine any question arising in the winding up, e.g. enforcing of calls, staying of proceeding or any other matter. Generally, such an application can be made for exercising all or any of the powers which the Court might exercise, if the company was being wound up by the Court (Section 518).

(7) A voluntary winding up shall not be a bar, *inter alia,* to the right of any creditor or contributory to have the company wound up by the Court; but in the case of such an application the Court shall have to be satisfied that the rights of the creditors or contributories or both would be prejudiced by a voluntary winding-up (Section 440).

The position of various parties :

Shareholders and contributories : A shareholder of a company is liable to pay the full amount on the shares held by him but nothing more. This liability continues even after winding-up ; but for the purposes of winding-up, he is

described by the Act as a contributory. Prior to the winding-up, the liability of a shareholder to the assets of the company is measured by the contractual obligation arising from membership. However, winding up creates a new cause of action for the liquidator and the liquidator can demand of him the payment of the unpaid calls even if they had become time-barred before liquidation [*Re. East Bengal Sagar Mills Ltd. 1982). 1 Cal. 132*]. The liability arises from the fact that his name appears on the register of members (*K. L. Goenka S. R. Majumdar (1958) 28 Comp. Cas. 536)*. According to Section 429, the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time specified in the calls made on him for enforcing that liability (by the liquidator). Thus, the liability of a contributory, though commencing at the date of the winding-up, is only contingent during the winding-up, since until a call is made, it is nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding-up. Such liability, however, creates a debt under Section 429 and it does not become payable until a call is made. It may be noted that the liability under this Section stands in striking contrast with the liability of a shareholder under Section 36(2) according to which all moneys payable by any member to the company under the memorandum or Articles shall be a debt due from him to the company. The debt under Section 36(2) arises *ex-centractu,* whereas the debt under Section 429 arises *ex-large* (i.e. as a result of the statute on the company going into liquidation. Thus Section 429 gives the liquidator a new cause of action which a company itself might not have.

The estate of the deceased shareholder is liable to the same extent as it would have been if he had been alive (Section 430). Section 431 lays down that if a contributory becomes insolvent after the commencement of the winding-up, he becomes as stranger to the company; although his name remains on the list of contributories, his assignee in insolvency represents him for all purposes and is to be deemed a contributory. Under Section 432, where a body corporate which is a contributory in itself ordered to be wound up, either before or after it has been placed on the list of contributories, the liquidator of the body corporate shall represent it for all the purposes of winding up of the company and shall be deemed a contributory.

A shareholder on the A list of contributories is liab le to the extent to which his shares are not fully paid up. But the liability of a member on the B list arises only in certain specific circumstances, mentioned in Section 426. The A list comprises the present members and the B list the past members, who ceased to be members within one year prior to the winding up. A past member is liable to contribute only when the present members have been unable to satisfy the contribution required from them in respect of their shares.

A person who is both a contributory and a creditor of the company (in

respect of dividends, profits or otherwise), cannot set off the debt due and owing from the company against his liability for calls even if there is an express agreement to do so. In other words, the contributory has to make his contribution to the assets of the company without any right to claim a set-off in regard to the amount due to him from the company *(Pure Milk Supply Co. Ltd. vs Hari Singh A.I.R. (1963) Punj 22).*

In addition to the aforesaid liabilities, Section 536 imposes a sort of restrictions on the members, namely that in the case of voluntary winding-up. no transfer of shares except transfers made to or with the sanction of the liquidator shall be made and that every alteration in the status of the members after the commencement of such winding up shall be void. In the case of winding up by or subject to the supervision of the Court, every disposition of the property including actionable claims of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding up shall be void unless the Court otherwise directs.

Creditors : A company can never be declared insolvent, although it may have become insolvent in the sense that it is unable to pay its debts. Where a solvent company is being wound up all debts payable on a contingency and claims against the company present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company, a just estimate being made as possible of the value of such debts or claims as may be subject to any contingency or may sound only in damages or for some other reason may not bear a certain value (Section 528). As regards the rights of the creditors of a company which is being wound up for its inability to pay its debt, the same rules prevail as in the case of insolvency law in respect of debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).

The secured creditor may rely on the security and ignore the liquidation altogether, or value his security and prove for the balance of his debt, or give up his security and prove the whole amount. Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first; liability for dividends is satisfied only if claims of outsiders are fully met.

Employees : A winding up order by a Court operates as a notice of discharge to employees and officer of the company, except when the business of the company is continued [Section 445 (3)]. A voluntary winding-up which involves a discontinuation of the business also operates as a discharge, and may also give rise to a claim for damage where there is an agreement for employment for a fixed time *(Reigete v. Union Manufacturing Company (1918) I.K.B. 592].*

Types of Voluntary winding-up : There are two types of voluntary winding up *viz.* members' voluntary winding-up and creditors' voluntary winding-

up. Where the directors are in a position to make the statutory declaration of solvency required under Section 488 of the Act the winding-up would be conducted as a *Members' voluntary winding-up* and would be controlled by the members themselves; the creditors would have no voice in the proceeding. If the directors do not make such a declaration, the winding-up would be conducted as a *Creditors' voluntary winding-up* and the creditors shall have a controlling voice in the procedure. In both the cases, the process of liquidation would be normally conducted without reference to the Court; although the Court shall have the power to determine any matter the liquidator or any creditor or contributory might refer to it.

Members' voluntary winding-up—declaration of solvency: In respect of a members' voluntary winding-up, two directors, where there are only two directors, and a majority of directors, where there are more than two, should make a declaration, called "declaration of solvency," in Form No. 149 pursuant to Rule 313 of the Companies (Court) Rules, 1959 verified by an affidavit. In the declaration, the following matters are required to be stated, namely, (i) that they have made a full enquiry into the affairs of the company, and (ii) that having made such enquiry, they have formed the opinion that the company has no debts or that it will be able to pay its debts in full within a period not exceeding three years from the commencement of the winding-up. To be effective :

(a) it must have been *made and filed* with the Registrar within the five weeks immediately preceding the date of passing of the winding-up resolution ; and

(b) it must be accompanied by a copy of the auditor's report on the profit and loss account of the company for the period commencing from the date of the last account to the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on the last-mentioned date and, also, embodies a statement of the company's assets and liabilities as at that date. The report of the auditor must be prepared, as far as circumstances permit, in the manner laid down by the Act (Section 488). This accompaniment is intended to be an additional safeguard.

Unless the above mentioned conditions are complied with, resolution passed for voluntary winding-up would be invalid and the members' voluntary winding-up cannot be effected *(S.P. Bhargava v. Rameswar A.I.R. (1952) M.P.3).*

Where the declaration of solvency is made by the directors with out any reasonable grounds that the company will be able to pay its debts in full within the period specified in the declaration, it would render them liable to imprisonment which may extend to 6 months and or to pay a fine exceeding Rs. 5,000. If the company is wound up in pursuance of such a resolution within a period of 5 weeks after the declaration was made, but its debts are neither paid off nor provided for in full within the period specified in the declaration, it would be

presumed, till the contrary is shown, that the directors did not have reasonable ground to form the opinion as to company's solvency [Section 488 (3) & (4)].

Creditor's Voluntary Winding up: Where the declaration of solvency, referred to under member's *voluntary winding-up* has not been made by the directors and filed with the Registrar, the winding-up is known as a *creditor's voluntary winding-up* [Section 488(5)].

Procedure: The procedure applicable to the two types of voluntary winding-up is somewhat different. The provision under Sections 490 to 498 are applicable to a members' voluntary winding-up and provisions under Sections 500 to 509 are applicable to a creditors' voluntary winding-up, whereas Sections 511 to 521 apply to both types of voluntary winding-up.

Procedure of members' voluntary winding-up: The procedure for a members' voluntary winding up of a company is narrated below:

(i) At the Board's meeting, the directors have to make a declaration of solvency under Section 488 of the Companies Act in Form 149 of the Companies (Court) Rules and Forms. If there are more than 2 directors, then the said declaration must be made by majority of them. This declaration has to be filed with the Registrar of Companies together with the auditor's report on the balance sheet and profit and loss account or income and expenditure account of the company made up to the date of the Board's meeting, the time limit for such filing being 5 weeks before the passing of the resolution for the winding-up.

(ii) Next, the company has to pass at its general meeting a special resolution called "resolution for voluntary winding-up" (Section 484). At this very meeting or at any meeting subsequent thereto, one or more liquidators are to be appointed by the company; also his or their remuneration, if it is to be given, should be fixed at the said meeting (Section 490).

(iii) Under Section 485, the aforesaid resolution to wind up the company volantarily has to be published in Official Gazette as also in a newspaper circulating in the district where the registered office of the company is situated. This publication is required to be made within 14 days of the passage of the resolution.

(iv) Under Section 493, the company has to give the notice of the appointment of the liquidator to the Registrar. This notice is to be given in form No. 36(b) of the Companies (Central Government's) General Rules and Forms. The liquidator has also to separately notify the Registrar, under Section 516, about his appointment.

(v) The liquidator is then required to do the following things, namely, speedy realisation of assets preparation of list of creditors; admission of proof, settlement of lists of contributories, making of such calls as are necessary, payment to secured creditors, of costs including the liquator's own remuneration, payment of preferential claims and distribution of the surplus *pre rate* amongst

the contributories after meeting all the claims of creditors and after adjusting all rights and claims. For resolving any doubts and difficulties, application may be made to the High Court.

(vi) *Duty of liquidator to call general meeting:* In the event of a voluntary winding-up being *continued for more than a year,* the liquidator shall call a general meeting of the company at the end of the first year from the commencement of the winding-up and at the end of each succeeding year within three months from the end of each year or such longer period as the Central Government may allow. Also, he shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year together with a statement in Form No. 153 (pursuant to Rule 328 of the Companies (Court) Rules, 1959] containing stipulated particulars in respect of winding-up proceedings and the position of the liquidation. Any failure on the part of the liquidator in complying with these provisions shall render him liable to fine to the extent of Rs. 100 in respect of each failure (Section 496). The liquidator has to keep all moneys in a scheduled bank; he must strictly adhere to the provisions of Section 553 and Rules 324 to 326 of the Companies (Court) Rules.

Where the winding-up of a company is not concluded within one year after its commencement, Section 551 requires that a statement by the liquidator in Form 153 of the Companies (Court) Rules, should be filed with the Registrar within 2 months of the close of such year (if he is not exempted from so doing by the Ceneral Government) and thereafter until the winding-up is concluded, at intervals of not more than one year or such shorter interval as may be prescribed. The statement should be audited by a chartered accountant.

(vii) *Final meeting and dissolution:* When the winding-up is complete, the liquidator shall, subject to the provisions contained in Section 98, make up an account of the winding-up which must show as to how the winding-up has been conducted and the property of the company has been disposed of; also he shall call a general meeting of the company to place before it the account [Form No. 155, pursuant to Rule 329 of the Companies (Court) Rules]. Such a meeting is required to be called by *advertisement* which must specify the time, place and object and be published, not less than one month before the meeting, in the Official Gazette as well as some newspaper circulating in the district where the registered office of the company is situated. Besides, he shall, within one week of the meeting, send to the Registrar and the Official Liquidator a copy of the account and also a return to each of them as regards the holding of meeting and of the date thereof [Section 497 (2) & (3)]. Where the meeting is not held for want of quorum, the liquidator shall, instead of the said return, make a return, to the effect that the meeting was duly called but no quorum was present thereat [Section 497 (4)]. Upon receiving the account and

either of the returns under sub-section (3) or (4), the Registrar must immediately register them, with a view to ensuring that the winding-up process of the companies (which have been voluntarily wound up) should not be conducted in a manner prejudicial to the interest of the shareholders or to the public.

On receipt of the final statement of accounts and the returns from the liquidator, the Official Liquidator shall make a scrutiny of the books and papers of the company. For the purpose, he shall be provided with all reasonable facilities by the liquidator and all officers (past and present) of the company.

Where the Official Liquidator, after scrutiny of the returns and account, reports to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest, the company is deemed to have been dissolved from the date of the submission of the report.

If the Official Liquidator,on such a scrutiny, reports to the Court that the affairs of the company *have been conducted* in a manner prejudicial to the interest of its members or the public, the Court shall direct the Official Liquidator to make a further investigation into the affairs of the company, and for that purpose, he shall be invested with all such powers as the Court may deem fit [Section 97 (6A)]. On receipt of the report as regards further investigation, the Court may either make an order that the company shall stand dissolved with effect from the date which it shall specify or shall make such other order as the circumstances of the case might justify [Section 497 (6B)].

Creditors' voluntary winding-up :

(1) The creditors of a company would be mainly concerned if the company arrives at the decision that it should wind up itself because of its inability to meet its libilities. The company in that case must call a meeting of the creditors to be held on the day or the day next following the date on which there is to be held a general meeting of the company at which the resolution for voluntary winding-up is to be proposed [Section 500 (1)].

(2) Notice of the meeting is to be sent to the creditors and it must also be advertised once at least in the Official Gazette and once at least in two newspapers circulating in the district where the registered office of the company is situated [Section 500 (2)].

At the meeting, of the creditors, the Board of Directors must cause a full statement of the position of the company's affairs, and a list of the company's creditors and the estimated amount of their claims, to be laid before the meeting of creditors. The Board of directors also must appoint one of their members to preside over the said meeting [Section 500 (3)].

If the meetieng of the company for passing the winding-up resolution is adjourned and at the adjourned meeting the resolution is passed, then any resolution passed at the creditors, meeting, though prior in date to that for winding-

up, would nevertheless be valid and effective as if it had been passed after the passing of the winding-up resolution [Section500 (5)].

The resolution passed at the creditors' meeting shall be notified by the company to the Registrar within *ten* days of the passing thereof (Section 501).

In a creditors' voluntary winding-up, the creditors and members appoint a liquidator in their respective meetings. If different persons are nominated, the creditors' nominee shall become the liquidator. However, any director, member or creditor may, within *seven* days after the nomination has been made by the creditors, apply to the Court for an order directing that the company's nominee shall be the liquidator instead of, or jointly with, the nominee of the creditors or appointing the Official Liquidator or some other person *than* the creditor's nominee (Section 502).

(3) If a vacancy occurs by death, resignation or otherwise in the office of a liquidator (other than the one appointed by, or by the direction of the Court) the creditors in general meeting may fill in the vacancy (Section 506).

Committee of Inspeetion :

(4) The creditors at the first meeting under Section 500, or at a subsequent meeting may appoint a Committee of Inspection consisting of not more than five persons (Section 503). The members of the Committee are to be nominated by the company at a general meeting. If any of the nominees is not acceptable to the creditors, they may by resolution choose any person in his place. However, the Court is empowered to direct otherwise.

(5) The Committee of Inspection and, if there is no such Committee, the creditors, may fix the remuneration of the liquidator. If they do not fix the remuneration, the Court would do so (Section 504. Section 465 (2) to (10) applicable to Committee of Inspection appointed in a compulsory winding-up will also apply to the Committee under Section 503, subject to such rules as may be made by the Central Government [Section 503 (5)].

(6) *Duty of liquidator to call general meeting* :

Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company, as in the case of members' winding-up as well as a meeting of the creditors at the end of the first year of the commencement of winding-up within three months from the end of each year or such longer period as the Central Government may allow. Such a meeting also must be called at the end of each succeeding year in the same manner. The liquidator must lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceeding year and also a statement in Form No. 153 pursuant to Rule 327 of Companies Court) Rules (Section 508).

(7) *Final meeting and Dissolution* :

As soon as the affairs of the company have been wound up, the liquidator

shall : (a) make up an account of the winding-up showing how the winding-up has been conducted and the property of the company has been disposed of, in Form No. 155, [pursuant to Rule 329 of the Companies (Court) Rules]. and (b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof.

N.B. To provide for the scrutiny of the records of a company which is being wound up voluntarily by the creditors, provisions have been made in sub-Sections (5), (6), (6A) and (6B) of Section 509 which are identical with those contained in the corresponding sub-sections of *Section* 497 which have been discussed earlier in the Study Paper.

Steps to be taken in a case where the company is solvent but the business for which it was formed has been completed :

(a) Prepare a statement of its assets and liabilities [Section 488 (2)].

(b) Prepare and file with the Registrar of Companies a statutory declaration by directors that the company will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding-up as may be specified in the declaration.

This must be done within five weeks before the date of the passing of the winding-up resolution, and must be delivered to the Registrar before that date. It must be accompanied by a copy of the report of the auditors of the company on the profit and loss account of the company (for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration) and the balance sheet of the company (made out as on the last-mentioned date). It must also embody a statement of the company's assets and liabilities, as at that date Section 488 (3)].

(c) Call a general meeting of the company to pass a resolution for the winding-up of the company (Section 484). As to resolution, it should be in accordance with the provisions of Section 189 (1).

(d) Hold meeting of shareholders in accordance with notice so as to pass the resolution referred to in (c) above.

(e) Appoint liquidator for the purpose of winding-up the affairs and distributing the assets of the company (Section 490).

(f) The company must give notice of appointment of liquidator to the Registrar of Companies (Section 493).

Duties and Responsibilities of Liquidator In Creditots' Voluntary Winding-up: The liquidator in a creditors' voluntary winding-up administers the company in very much the same way in which the directors administer it before the commencement of winding-up. In so far as that the liquidator can be rightly described as the agent of the company.

The liqiuidator owes certain duties towards the creditors and contributories under the statute, including that of administration of the assets of the company.

These he holds in trust for them. To this extent he is a *trustee* and he must discharge his fiduciary duties honestly and faithfully. If he neglects these duties, he may be held personally liable by the party prejudiced or by misfeasance proceedings, under Section 543. Thus the liquidator in a creditor's voluntary winding-up has a *dual status both as agent and trustee.*

Like any other liquidator, it is also his duty to take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. To discharge this responsibility, it is his duty to take the aid, if need be, of the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction the aforesaid property, etc., are found (Section 456).

As regards the distribution, on realisation, of the assets of the company, the liquidator is under an obligation to apply such assets subject to the provisions of the Act as to preferential payments in satisfaction of its liabilities *pari passu*. He must therafter distribute the residue among the members according to their rights and interests in the company (Section 511). For the purpose, the liquidator has to ascertain the assets and liabilities of the company and draw up a scheme of distribution.

It is the liquidator's duty to compel the directors or the officers of the company in liquidation to supply him with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, *inter alia* to :

(i) the assets of the company, stating separately the cash balance in hand and at banks and the negotiable securities held by the company ;

(ii) its debts and liabilities ;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor ; and

(iv) debts due to the company and the amount likely to be realised on their account (Section 511 A read with Section 454).

Within 30 days of his appointment, the liquidator is duty-bound to publish his appointment in the Official Gazette and notify the same in the prescribed form to the Registrar (Section 516).

On the detection of a fraud having been committed by promoters, directors, etc., it is the liquidator's responsibility to invoke the aid of Section 519 and apply to the Court for the public examination of them.

For the determination of any question arising in the winding-up or for getting the rights and powers of the Court regarding enforcement of calls, staying of proceedings or other matters exercised by it, it is the reponsibility of the liquidator to apply to the Court (Section 518).

Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company and a meeting of the

creditors at the end of the first year of the commencement of winding-up and at the end of each succeeding year, or as soon thereafter as may be convenient within 3 months from the end of the year or such longer period as the Central Government may allow. The liquidator must lay before the meetings an account of his acts and dealings and of the conduct of the winding-up during the preceding year and also a statement in Form No. 153 pursuant to Rule 327 of Companies Court) Rules (Section 508).

As soon as the affairs of the company have been wound up, the liquidator shall :

(a) make up an account of the winding-up showing how the winding-up has been conducted and the property of the company has been disposed of, in Form No. 155 [pursuant to Rule 329 of the Companies (Court Rules)]; and

(b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof. Besides, the liquidator, within one week from the date the meeting is held, must send to the Registrar and the official liquidator a copy of each of the account and also a return to each of them regarding the holding of the meeting and of the date thereof. Where the meeting is not held for want of quorum, the liquidator shall, instead of the said return, make a return to the effect that the meeting was duly called but no quoram was present thereat.

Under Section 512 (5), it is the liquidator's duty to pay the debts of the company and to adjust the rights of the coutributories among themselves.

Position of a 'voluntary' liquidator.

In has been held that a voluntary liqidator is not an officer of the Court, *[Re Hills Waterfall etc., Co. (196) Ch. 946, 954]* ; also that he can more rightly be described as the agent of the company *[Knowles v. Scott (181), 1 Ch. 717]*.

The status of a liquidator as an agent of the company can be appreciated if one considers that in a voluntary winding-up the liquidator is appointed by the shareholders, at a general meeting, both in the case of members' and creditors' winding-up; the only difference between the two is that where the person nominated by the creditors at their separate meeting is different from the one proposed by the members the nominee of the creditors takes the office of the liquidator. Further, under Section 512 of the Companies Act, a liquidator can exercise certain powers, with the sanction of a special resolution of the company, in the case of a members winding-up *and* in the case of creditors' winding-up with the sanction of the Court or the Committee of Inspection or (if there is no such committee) of the meeting of the creditors ; he also has the right to exercise a number of powers of his own as the agent of the company. A company in volnntary winding-up thus is administered by the loquidator in very mech the same way as it is done by the directors, before the commencement of winding-up.

It must, however, be remembered that the liquidator owes certain duties towards the creditors and contributories under the statute including that of administation of the assets of the company. These he holds in trust for them. In so far as this, he is a trustee. If he neglects these duties, he may be held personally liable by the party prejudiced, or misfeasance proceeding under Section 543 can be taken against him. Thus the liquidator has a dual status both of agent and trustee.

Provisions applicable to every voluntary winding-up: These provisions are contained in Sections 510 to 521. These are are summarised below :

(a) As regards the distribution, on realisation of the assets of the company in liquidation, such assets should be applied subject to the provisions of the Act as to preferential payment, in satisfaction of its liabilities *pari passu* and the residue will be distributed among the members according to their rights and interests in the company (Section 511). For the purpose the liquidator has to ascertain the assets and liabilities of the company and draw up a scheme of distribution.

(b) The liquidator in all cases is entitled to be supplied with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, *inter alia, to :*

(i) the assets of the company, stating separately the balance in hand and at banks, and the negotiable securities held by the company ;

(ii) its debts and liabilities ;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor ; and

(iv) debts due to the company and the amount likely to be realized on their account.

The liqidator can compel one or more directors or other officer of the company to submit such a statement within 21 days from the date of the commencement of the winding-up. He may also extend the time up to a maximum period of 3 months from that date (Section 511A read with Section 454.

(c) A body corporate cannot be appointed as a liquidator (Section 513).

(d) If for any reason whatever there is no liquidator to act, the Court may appoint the Official Liquidator or any other person as a liquidator. On a cause being shown, the Court may remove a liquidator and appoint in his stead the Official Liquidator. The Registrar is also empowered to apply to the Court for such appointment or removal so that the liquidation proceedings be accelerated and the proper conduct of the liquidation by a competent liquidator be ensured (Section 515).

(e) Within 30 days of his appointment, the liquidator is required to publish his appointment in the Official Gazette and notify the same in the prescribed form to the Registrar (Section 516).

(f) Section 518 empowers the liquidator or any contributory or creditor to apply to the Court to have questions determined or to exercise the powers as specified in the Section.

(g) Section 519 empowers the liquidator to apply to the Court for public examination of promoters, directors, etc. on the detection of a fraud having been committed by them.

(h) All costs, charges and expenses properly incurred in the winding-up are required to be paid, subject to the rights of secured creditors, out of the assets of company in priority to all other claims (Section 520).

Winding-up under Supervision of Court : The provisions relating to this type of winding-up are contained in Section 552 to 526.

Under Section 521, at any time after the company has passed a resolution for voluntary winding-up, the Court may direct that the voluntary winding-up shall continue subject to such supervision of the Court and with such liberty for creditor's contributories or others to apply to the Court, as the Court thinks just. The Court shall pass such an order only on the basis of an application by any creditor, contributory or the voluntary liquidator provided the Court thinks that such a course is necessary or desirable in the interest of the company or contributories or of the creditors (*Re Zoedone Co. 1888, 54 L.J. Ch. 465*). If the application is made by the creditors, the Court would be more inclined to pass a supervision order. On a contributory's petition, it is generally averse to making such an order unless it is shown that the resolution for voluntary winding-up was fraudulently passed or unless the creditors also are in favour of such an order being passed by the Court (*In re Beaujol als Wine Co. 1868, 3 Ch. App. 15*). Under Rule 316 of the Companies (Court) Rules, upon the aforesaid order being made, the liquidator of the company must, within 21 days of the order, advertise it in one issue of the Official Gazette of the State or Union Territory concerned, and in one issue of a newspaper in English or in the regional language circulating in the State or the Union Territory, and within that period file a certified copy of the order with the Registrar.

The Court's power under Section 522 being wide, it can make such an order as it thinks fit, regard being had to the circumstances of a case (*Gurdyal and Other v. Kulu Valley Transport (P) Ltd. (1964) 1 Comp L.J. 222*).

Consequence of such an order :

(i) It gives the Court the same jurisdiction over suits and legal proceedings, as it would have under a compulsory winding-up (Section 523).

(ii) The winding-up, however, would be deemed to have commenced from the date on which the first resolution for voluntary winding-up was passed ; for the supervision order does not in fact commence the winding-up but it continues one already existing and commenced winding-up (*In re Taurine Co. (1883) 25 Ch. D 118*).

(iii) Unless the Court appoints an additional liquidator, (which it may do if it likes) the liquidator, appointed already in the voluntary winding-up, continues to act. In other words, the existing liquidator shall continue to act by himself (Section 524).

(iv) A liquidator appointed by the Court shall have the same powers and shall be subject to the same obligations as the one appointed under any other provision of this Act (Section 525). In consequence Rules 315 to 334 of the Companies Court) Rules which apply to the liquidator appointed in a voluntary winding-up, also ahall apply to liquidator appointed in a winding-up subject to supervision.

(v) Subject to such restrictions as the Court may impose, the liquidator will be entitled to exercise all his powers, without the sanction or intervention of the Court in the same manner as if the winding-up were a voluntary winding-up [Section 526 (1)]. However, if the Court at any time decides to interfere with the winding-up, it would be able to exercise all the powers, as if the winding-up were a compulsory winding-up *(in re Carwar Co. Ltd. 1882 6 Bom. 640)*.

(vi) An order made under Section 522, shell be deemed to be an order of the Court, for winding-up the company by the Court for all purposes (including the staying of suits and other proceedings. However, this provision is subject to the provision stated in the preceding paragraph (v.). Moreover any order so made empowers the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding-up the company altogether by the Court [Section 526 (2)].

Distinction between a winding-up under the supervision of the Court and voluntary winding-up :

(a) The Court, in a windind-up subject to supervision may appoint an additional liquidator, who may be the Official Liquidator. The Court may also remove a liquidator appointed by it or otherwise and may appoint the Official Liquidator as the only liquidator. It may also appoint or remove a liquidator on the application of the Registrar (Section 524).

(b) Transfer of shares made after the commencement of winding-up are void unless the Court orders otherwise in a winding-up under supervision. In a voluntary winding-up, transfers can be agreed to by the liquidator (Section 536).

(c) Any attachment, distress or execution against the company after the commencement of winding- up subject to supervision without leave of the Court is void (Section 537). This does not apply to the voluntary winding-up.

(d) In the case of a winding-up under the supervision of the Court, the Court can, either on its own motion or on the application of any person interested to prosecute a defaulting officer or a member of company direct the liquidator to proceed against him. In the case of a

voluntary winding-up, the liquidator only makes a report to the Registrar in this regard [Section 545 (1) and (2)].

(e) For exercising certain powers conferred by Section 546, the liquidator has to get the sanction by special resolution of the company in voluntary winding-up and of the Court where winding-up is under supervision.

General provisions on winding-up : Sections 528 to 560 contain provisions applicable to every mode of winding-up. Some of the important provisions are stated below.

(1) Section 551 prescribes that information as to the pending liquidation, unless exempted by the Central Government, shall be given by the liquidator within 2 months of the expiry of the first year and thereafter at intervals of not more than one year, by filing a statement in the prescribed form [Form No. 153 Companies (Court) Rules]; also that the statement shall be audited by a chartered accountant. The statement shall have to be filed (a) in the case of a winding-up by or subject to the supervision of the Court, in the Court ; and (b) in case of a voluntary winding-up, with the Registrar.

N B—Students should note that this requirement is over and above the requirements under Sections 496 and 497 (in the case of members' voluntary winding-up) or 508 and 509 (in the case of creditors' voluntary winding-up).

(2) *Debts that are provable :* Debts of all descriptions in a winding-up are payable only when these have been proved. All debts payable on a contingency and claims against the company, whether present or future, certain or contigent, ascertained or unascertained, can be proved against a company. When the amount of a debt cannot be ascertained, a fair estimate thereof may be made for purposes of proof (Section 528). This Section applies to proof of debts when the company is in a solvent state, *i.e.* when its assets are sufficient to pay all its debts and liabilities and the costs of the winding-up. Where the company is insolvent, Section 528 would be applicable. In the winding-up of an insolvent company, the same rules are applicable as regards : (i) debts provable ; (ii) the valuation of annuities and future and contingent liabilities, and (iii) the respective rights of secured and unsecured creditor, as those in the case of an estate of person adjudged insolvent under the Insolvency Law. In the latter case, all the persons, entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they are entitled to make. If, however, a secured creditor, instead of relinquishing his security and proving for his debts proceeds to realise his security, he shall be liable to bear the expenses by the liquidator (including a provisional liquidator) for the preservation of the security before it is realised by the secured creditor (Section 529).

Note : The aforesaid rules of insolvency as contained in Section 529 will be applicable only in respect of the three matters specified under paragraphs, (i), (ii) and (iii) but no further ; and they apply except in so for as

special provisions are contained in the Companies Act. [*Itiara Free Press Journal* (1956) M.L.J. 463]. Further, Section 529 shall cease to be applicable as soon as it is found that the company in the course of winding-up is not insolvent [*Re Five Industrial Commodities Ltd.* (1953) 3 A.E.R. 707].

(3) *Preferential payments:* The following debts must, according to provisions contained in Section 530, be paid in priority to the claims of unsecured creditors :

(a) All revenues, taxes, cesses and rates due to the Central or a State Government or a local authority, having become due and payable within the twelve months etore the relevant date ;

(b) All wages and salaries of an employee for service rendered for a period not exceeding four months within the preceding 12 months before the relevant date and any compensation payable to any workman under any of the provisions of Chapter VA of the Industrial Disputes Act, 1947, but not exceeding Rs. 1,000 in any one case ;

(c) All accrued holiday remuneration ;

In case (b) and (c) where amount is paid out of money advanced by another person for that purpose, that person, is subrogated to rights of employee who has been paid [Section 530 (4)];

(d) Unless the winding-up is merely for purposes of amalgamation or of reconstruction, employer's contribution to the State Insurance Scheme under the Employees' State Insurance Act, 1948 payable during 12 months before the relevant date, and all amount due in respect of any compensation or liability for compensation in respect of death or disablement compensation under the Workman Compensation Act, 1923 ;

(e) All sums due to any employee from any fund including a provident, pension or a gratuity for the welfare of the employees, maintained by the company ; and

(f) Expenses payable by any company in respect of an investigation held under Section 235 or 237 of the Act.

The 'relevant date' means *in the case of winding-up by the Court:*

(i) the date of the appointment or first appointment of a provisional liquidator ; or

(ii) if no such appointment was made, the date of the winding-up order, *unless in either case the company had commenced to be wound up voluntarily before that date.*

In all other cases, it means the voluntary winding-up resolution.

If the assets are insufficient to pay the foregoing preferential debts in full they abate in equal proportions. If necessary, these debts may be paid out of the proceeds of any assets subject to a floating charge.

The order of priority in paying off debts in a winding-up may be roughly worked out as follows ; (i) Secured creditors (mortgagees) ; (ii) costs and charges of winding-up [In a voluntary winding-up, automatically this has priority. In a compulsory winding-up, Court has to give it priority by order (See Sections 576 and 520] ; (iii) preferential debts (Section 530) ; (iv) floating charges (See Section 530 (5) (b)] ; and (v) unsecured creditors,

Debts that are secured by a fixed charge which have to be paid up to the value of the property concerned, are not affected by the above.

If there is any surplus, capital is returned to preference shareholders first and then to equity shareholders If there is still any surplus left, it depends on the articles whether preference shareholders are entitled to share that surplus.

Section 530 (I) requires that the revenues, taxes, etc., should have become *due and payable* within the period of 12 months *immediately preceding* the relevant date. The arrears of sales tax not to be paid preferentially under Section 530 although the same become 'recoverable' as arrears of land revenue under the Sales-tax Act. The words 'recoverable' and 'payable' have got completely different connotations. The word 'revenues' used in Section 530 (1) (a) of the Companies Act means revenues which have become due and payable as revenues within the next 12 months before the relevant date, and not revenues which are recoverable as arrears of land revenue. Sales tax, assessed after winding-up, is not revenue which has become due and payable within 12 months next before the relevant date. Therefore it cannot be paid preferntially under Section 530. *(Sales-tax Officer, Kanpur v. Official Liquidator* (1968) 38 Comp Cas 430).

Advance income-tax demanded and due under the Income-tax Act is to be paid preferentially under Section 530 (1) (a) of the Companies Act provided it becomes due and payable within the twelve months next before the relevant date. *(Joint Official Liquidator v. Comm. of Income-tax (1954) I.M.L.J.-282-A.I.R.* 1954 *Mad 858).* But the Calcutta High Court has held a contrary view. *(Suburban Bank Ltd.* A.I.R. (1953) Cal. 487).

Ex-gratia payments to employees of the company are not within the ambit of Section 530 (1) (b) *(Vijay Card Board Co. Ltd. v. Collector, District Hyderabad* A.I.R. (1957) Andhra Pradesh 725).

Under Section 530 (4), the bank which provided an overdraft for making money available for payment of wages, is entitled to preferential payment for the money so advanced and paid *(Re Pempgill Mill Ltd. (1967)* Comp. L.J. 262).

'Bonus' payable to staff appears to be covered by the expression 'all wages' occurring in Section 530 (1) (b) and therefore, is to be paid preferentually to the extent laid down in Section 530 (1) (b) specially if it is due under the Payment of Bonus Act Company's contribution payable to the Employees' State Insurance Corporation is, for the purposes of Section 530, a preferential payment; *Re Bihar Bolts Engineering Work Ltd.* A.I.R. 1959 Pat. 417).

In the winding-up of a company, an advocate is entitled to preferential payment of his fees and expenses out of the fruits of a litigation which he had successfully conducted for the company which are in the hands of the liquidator *(Kutti Krishna Menon v Cochin Mercantile Ltd.* (1962) 32 Comp. Cas. 578)

Effect of winding-up on antecedent and other transaction: With a view to affording better protection to the creditors of a company, the principle of fraudulent

preference as existent in the insolvency laws, has been extended to companies so as to tender void certain categories of transactions entered into within a limited period before the commencement of winding-up. The detailed provisions in this regard are contained in Sections 531 to 537 of the Act, which are summarised below :

(i) *Fraudulent Preference* : All transfers of property, movable or immovable, made by delivery of goods or payment of money etc, if made by an insolvent person within 3 months before the presentation of insolvency petition, would be held to be a fraudulent preference of its creditors and would be invalid. Similarly, in the case of a company all such transfers, if made within 6 months before the commencement of its winding-up, would be deemed to be a fraudulent preference of its creditors, and would be invalid (Section 531). For the purpose of proving a fraudulent preference, two things need be shown, *viz.*

(a) that in the case of a winding-up by or subject to the supervision of the Court the transaction took place within 6 months before *the presentation of the petition* and in the case of voluntary winding-up, the transaction took place within 6 months of the *passing of the resolution* for winding-up [Section 531 (2)] : and.

(b) that the main motive in the mind of the company, acting through its directors, was to prefer one creditor to the other (*In Re Jackson & Bassford* (1906) 2 *Ch*, 467).

On the basis of the above mentioned provisions of Section 531, let us examine the following situation : A company has been running into losses. To one of its creditors it gives a mortgage on its immovable property on 1st May, 1980. On October 15, 1980, a winding-up petition is presented to the Court which passes an order of winding-up on the 30th November, 1980. It is clear from this situation that the transaction of mortgage on the company's immovable property took place within 6 months before the presentation of the petition for winding-up. Now, if it can further be proved that the dominant motive of the company was to prefer one creditor to other creditors, then the transaction would be deemed to be fraudulent preference and hence invalid. The real test is whether the debtor (the company in the said illustration) in making the transfer is doing what he himself felt bound or compelled to do. If so, the case does not fall within the purview of fraudulent preference (*Nabin Kishori v. Jagneshwar A.I.R.* (1983) *Cal.* 809; *In re M.I.C. Trust Ltd.* (1933) *Ch.* 542).

Any transfer of movable or immovable property or any delivery of goods by a company, save and except a transfer or delivery in the course of the company's business in favour of a purchaser or encumbrancer in good faith and for valuable consideration, shall be void against the liquidator, if such transfer or delivery is made within one year before the presentation of the winding-up petition by or subject to the supervision of the Court or the passing of a resolution for the voluntary winding-up (Section 531 A).

Any transfers or assignments by a company of all the property to trustees for the benefit of its creditors are void (Section 532).

If an act done by a company is invalid under Section 531 as a fraudulent preference of a person interested in property mortgaged or charged in his favour to secure the company's debt, the person so preferred would be liable, as a surety for the debt to the extent of the mortgage (or the charge) on the property or the value of his interest, whichever is less (Section 532).

(ii) *Limitation on rights under a floating charge:* There are two major statutory limitations to rights arising out of a floating charge. First, a floating charge created within 12 months of the commencement of winding-up, unless it is proved that the company immediately after the creation of the charge was solvent, is invalid except up to the amount of any cash paid to the company at the time or subsequent to the creation of, and in consideration for, the charge together with interest on the amount at 5% per annum or other prescribed rate (Section 534). Secondly, preferential debts have also priority over debts secured by a floating charge (Sections 123 and 530) and they must be paid out of the assets covered by a floating charge to the extent that they cannot be met out of assets available for payments of unsecured creditors.

N.B. : See I.S.P. (N) CL 3 for the discussion on fixed and floating charge.

(iii) *Disclaimer of onerous property :* The liquidator may, with the leave of the Court, disclaim any onerous property within twelve months of the commencement of the winding-up. If the existence of any disclaimable property does not come to the knowledge of the liquidator within one month after the commencement of the winding-up, he can disclaim at any time within 12 months after he has become aware of it. The Court may however, extend the time.

An onerous property may consist of : (a) land of any tenure, burdened with onerous covenants (b) shares or stocks in companies ; (c) any other property which is unsaleable or is not readily saleable, being onerous, binding the possessor thereof either to perform any onerous act or to pay any sum of money ; or (d) unprofitable contracts.

His right to disclaim is lost if, within twenty eight days or such extended period as may be allowed by the Court of receiving a demand from any interested person to make his decision, he does not give notice that he intends to apply for have to disclaim.

Any person injured by disclaimer is treated as a creditor of the company to the amount of compensation or damages payable in respect of the injury, and may prove in the winding-up to the extent of the injury (Section 535).

(*iv*) *Avoidance of transfers, etc.* : In the case of a voluntary winding-up, any transfer of shares in the company, which has not been sanctioned by the liquidator, and any alteration in the status of the members of the company made after the commencement of the winding-up, is void.

In the case of a winding-up by or subject to the supervision of the Court,

all disposition of properties (including actionable claims) belonging to the company as well as transfer of shares in the company or alteration in the status of its members which are made after the commencement of the winding-up are void unless otherwise ordered by the Court (Section 536).

(v) *Avoidance of certain attachments, executions, etc* : In the case of any company which is being wound up by or subject to the supervision of the Court, (a) any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding-up or (b) any sale held, without leave of the Court, of any of the properties or effects of the company after such commencement is void. These provisions, however, will not apply to any proceeding for the recovery of any tax or impost or any dues payable to the Government (Section 537).

In *Rajratna Naranbhai Mills Co. Ltd. (In liquidation) by its Official Liquidator v. New Quality Bobbin Works (1973)* 43 *Comp. Cas* 131, three issues emerged for decision. These are as follows :

First, where an attachment of the company's property under a Court's order takes place prior to the filing of the winding-up petition and the scale of the attachment property takes place before the issue of the winding-up order, can the liquidator claim the sale-proceeds? It was held that on account of the sale of the property having taken place after the commencement of the winding-up proceedings, Section 537 of the Act would operate and the sale of the shares would be void. Where the respondent had derived benefit under a void contract, he would be under an obligation to return it to the Official Liquidator of the company in liquidation who would be the only claimant of the benefit. Secondly, if the sale-proceeds are claimable, would the liquidator be required to file a separate suit ? It has been held that the summons for getting the relief under Section 537 by the official liquidator was maintainable and there was no necessity for the liquidator to file a separate suit. When the official liquidator if empowered by Section 457 (1) of the Act to institute or defend legal proceedings and a performance of his duty, finds a transaction to be void against him—the transaction becoming void because of the winding-up proceedings it would be a question of fact arising in the course of winding-up and the High Court would have the jurisdiction to decide the question. This is the scope and ambit of jurisdiction conferred upon the High Court under Section 446 (2) of the Act. When 446(2) confers this special jurisdiction to entertain the present summons, it would not be lost by virtue of Section 15 of the Civil Procedure Code. Therefore, the liquidator would not have to file the suit in the Civil Court. Thirdly, whether the application by the liquidator to the High Court for the recovery of the sale proceeds was barred by limitation ? Articles 137 of the Limitation Act, 1963 would apply only to applications made under the Code of Civil Procedure. The liquidator made this application not under the Code of

Civil Procedure but under the Companies Act to the High Court on whom jurisdiction is conferred by Section 10 of the Companies Act. It was, therefore, held that the application was not barred by limitation.

Offences by officers of companies in liquidation : The Act provides certain punishments to be inflicted on past or present officers of a company which is in the course of winding-up (i) who do not disclose to the liquidator all the property of the company and consideration for which the same has been disposed of, (ii) who conceal or fraudulently remove any part of the property of the company of value of Rs. 100 or more within twelve months next before the commencement of the winding-up, (iii) who make any material omission in their statements about the affairs of the company, (iv) who are guilty of any false representation or fraud or obtaining consent of the creditor to the agreement relating to the affair of the company or to a winding-up.

Note : The above is illustrative of offences for which an officer may be punished.

For a complete list of such offences read Section 538 (1)(a) to (p).

The officers may be punished on any one of the aforementioned grounds with imprisonment or with fine or with both.

Offences against the Act ; No Court shall take cognizance of any offence against the Act, except on the complaint in writing made by the Registrar, or a shareholder or a person authorised by the Central Government in this regard [Section 621] (1)]. In spite of anything contained in the Code of Criminal Procedure if the complainant is either the Registrar or the Central Government's deputationist, his personal attendance before the Court trying the offence shall not be necessary, unless the Court for the reasons to be recorded in writing requires his personal attendance at the trial [Section 621 (1A)]. The amount of fine, imposed under the Act by the Court may be applied, under the direction of the Court, in or towards the payment of the costs of proceedings, or rewarding the person on whose information the fine is recovered [Section 626]. For false statements made in, as well as omissions intentionally made of, any material fact knowing it to be material, any return, report, certificate, balance sheet, prospectus, statement or other document, Section 628 renders the offence punishable with imprisonment extending-up to 2 years as well as with a fine. Similarly, under Section 629 an offender is punishable for intentionally giving false evidence in any examination on oath,

Falsification of book : If with intent to defraud or deceive, any person, any officer or contributory of a company destroys, mutilates, alters, falsifies, secretes, etc, any books, papers or securities, or is a party to any of these acts, he will be punishable with imprisonment for a period extending up to 7 years and fine. He will also be equally punishable, if he makes or is privy to the making of, any false or fraudulent entry in any register books of account, etc. belonging to the company (Section 539).

An auditor, being an officer of the company, if culpable in the circumstance would be liable to be punished as prescribed. The provisions of this Section can be invoked only when the company is being wound up.

Liabilities where proper accounts not kept : If in a winding-up it is found that proper books of account have not been kept throughout the period of two years preceding the commencement of winding-up (or the period between the incorporation of the company and the commencement of the winding-up whichever is shorter) the officers of the company would be liable to imprisonment for a term extending to one year. They may, however, escape liability, if they can show that they had acted honestly, and that in view of the circumstances in which the business was carried on, the default was excusable.

Proper books of account will be deemed to have been kept, if there have been kept (a), such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day-to-day in sufficent detail of all cash received and all cash paid, and (b) statement of annual stock taking with all necessary particulars, where the business of the company has involved dealings in goods (Section 541).

Liabilities for fraudulent trading : If, in the course of a winding-up, it transpires that the business has been carried on with the intent to defraud creditors or others, the Court may on the application of the Official Liquidator, or the liquidator or any creditor or contributory, declare that any person who were knowingly parties to such a carrying on the business shall be *personally liable to an unlimited extent* for all or any of the company's debts or liabilities. He may also be called upon to pay a fine up to Rs. 5,000 or sentenced to imprisonment up to two years or with both (Section 542).

Misfeasance : If, in the course of winding-up of a company, it appears that any person who had taken part in the formation or promotion of the company, or any past or present director, manager, liquidator or other officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Liquidator, or of the liquidator, or any creditor or contributory, examine into the conduct of such person, and compel him to repay or restore the money or property or make compensation to the company for misfeasance or breach of trust, misapplication etc. (Section 543).

Now suppose, the Official Liquidator of a company in liquidation institutes misfeasance proceedings against the managing director thereof and during the pendency of the proceeding itself the managing director passes away. Can the legal representatives of the deceased managing director be impleaded and the proceedings continued against them ? This question came up for judicial decision in *Official Liquidator v. Dr. Sailendra Nath Sinha and other (1973) 43 Comp. Cas 107.*

Held : in such a situation, the legal representative of the deceased managing director might be impleaded and the proceeding be continued against them. The two constituents of misfeasance are : (a) an act in the nature of a breach of trust ; and (b) an act which involves the company in actual loss. Directors' liability sought to be established under Section 543 is not based on mere tort but on the breach of a fiduciary relationship or the failure to perform duties undertaken by him in the capacity of a trustee. Therefore, the liquidator's cause of action survives the death of the director. Section 543 prescribes only a summary proceeding intended for the rastoration or reinstitution of the company's property which has been lost on account of the particular acts of the directors and other officers in transgression of their fiduciary duties. By filing a suit under Section 543, the liquidator seeks an equitable remedy by a summary procedure. Section 543 deals only with the procedure and does not confer any new rights.

Misfeasance in an act or omission, in relation to the company, which causes loss or injury to the company. Although loss to the company has not been expressly stated in Section 543, nevertheless such 'loss' has to be implied in case of misapplication or retainer. Only such an act of misfeasance as results in the loss to the company will fall within the ambit of Section 543. It is essential for the liquidator to establish that the respondents are accountable for some goods or money belonging to the company or that they are guilty of misapplication, retainer or breach of trust (*In re. Vijay Laxmi Sugar Mill Ltd.* A.I.R. 1963 All 55). For the creation of liability under Setion 543, it must be shown that there has been dishonesty or fraud or at least gross and culpable negligence *Pillai Central Bank v. Augusti* A.I.R. 196, Ker. 121). An honest mistake, not amounting to culpable negligence or breach of duty, would not be misfeasance (*Ayyangar v. Official Assignee of Madras, 55* Mad. 153).

Where the person guilty of the offence is a firm or body corporate the Court may make the aforesaid order against the individul who was at the relevant time a partner of the firm or a director of the body corporate (Section 544).

Notes : (1) For the purpose of Section 543 an auditor is an officer (See Section 2 (30)].

(2) Section 543 provides for a summary remedy for bringing erring officers of the company to book and the long winded remedy by way of suit is always available in addition ;

(3) Illustrations of misfeasance are : improper payment of dividends : *ultra vires* investment ; selling his own property to company without disclosure : allotting shares in contravention of Section 69, etc ; and

(4) Misfeasance summons would also lie against directors when they have paid dividend out of capital, knowingly allotted shares to infants etc. Misfeasance lies against liquidator when he has negligently admitted a claim.

Misfeasance proceedings can be taken against the auditors under Section 543 of the Companies Act if they are found to have been guilty of any misfeasance or breach of

trust in relation to the company. Such a liability may arise due to non-performance or unsatisfactory performance of duties by the auditor in relation to the account of the company, as a result of which the company has suffered losses. The liability is a civil liability and the Court may call upon the auditor to make good the damages suffered by the company. But the action against the auditor under the aforementioned provision of law can be taken only if the business of the company is in the course of being wound up. The directors of a company, while it is functioning, can also take an action against the auditor for negligence in circumstances similar to those aforementioned.

The application must be made within 5 years from the date of the order of winding-up, or the first appointment of liquidator, or of the misapplication, retainer misfeasance or breach of trust, as the case may be, whichever is longer.

Power of Court to grant relief to officers against liability for misfeasance, breach of duty, etc : If in any proceeding for misfeasance against an officer of a company it appears to the Court hearing the case that he is or may be liable in respect of the misfeasance, negligence, breach of duty, etc., but that he has acted honestly, and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him either wholly or partly, from his liability on such terms as it may think fit. But in a criminal proceeding under this sub-section, the Court is bereft of any power to grant relief from any civil liability which may attach to an officer in respet of such misfeasance [Section 633 (1)].

Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any misfeasance, etc., he may apply to the High Court for relief and the High Court, on such application, has the same power to relieve him as it would have had if it had been a Court before which proceedings against that officer for misfeasance, etc, had been brought under sub-section (1) of Section 633 [Section 633 (2)].

But the relief under sub-section (1) or sub-section (2) can be granted to an officer, only if the relevant Court has, by notice served in the manner specified by it, required the Registrar or any other person to show cause why such relief should not be granted (Section 633) (3)].

It should be noted that only an officer of the company and not company itself can apply for relief. But it is for the Court before which the proceeding is pending and not for High Court to grant relief. The High Court can grant relief only under Sub section (2) against apprehended prosecution.

Prosecution of delinquent officers and members of the company (Section 545) : If it appears to the Court in a winding-up *by or subject to the supervision of Court* that any past or present officer or any member of the company has been guilty of any offence in relation to the company, the Court may, either on the application of any person interested in the winding up, or of its own

motion, direct the liquidator either himself to prosecute that offender or to refer the matter to the Registrar. In the latter case, if the Registrar considers it to be a fit case for prosecution, he shall report the matter to the Central Government, which may, after taking such advice as it thinks fit, direct the Registrar to institute such proceedings for the pursose. No report shall, however, be made by the Registrar unless an opportunity is given to the accused person to make a statement to him in writing and of being heard thereon.

Similarly, if, in the course of the voluntary winding-up it appears to the liquidator that any such person as stated above has been guilty of criminal offence in relation to the company, then he shall forthwith report to the Registrar. The Registrar may, in this case, do any of the three, *viz.* (i) he may proceed as if the matter was referred to him by the Court; (ii) he may refer the matter to the Central Government for further enquiry whereupon they shall investigate the matter and, if thought expedient, may apply to the Court fot an order conferring on any person designated by them, all such powers of investigating the affairs of the cnmpany as are provided by the Act, in the case of compulsory winding up ; or (iii) if he is of the opinionthat the case is not a fit one for the prosecution, he shall inform the liquidator accordingly. The liquidator in the last case if he holds a different opinion, may himself take proceedings against the offender after securing the sanction of the Court. In case, however, the liquidator does not make a report to the Registrar as he should, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such report which, on being made shall be dealt with by the Registrar in any one of the three ways mentioned above.

In connection with every prosecution in pursuance of these provisions, it shall be the duty of the liquidator and of every officer and agent of the company, past and present (other than the defendant in the proceeding), to give to the Registrar all assistance he is reasonably able to give. 'Agent' here includes any banker, legal advisor or auditor of the company. In case of default, the Court may, on the application of the Registrar, direct performance of this duty. Where the liquidator is in default, the Court may order him to pay the cost of the application personally unless it appears that the default was due to the liquidator not having in the hands sufficient assets of the company.

Disposal of books and papers of the company: In a winding-up up the Court or subject to the supervision of Court, the Court will direct how the books and papers of the company and of the liquidator are to be disposed of.

In the case of a members' voluntary winding up they are disposed of in such manner as the company, by special resolution, directs and in the case of creditors' voluntary winding-up in such a way as the Committee of Inspection and if there is such Committee, as the company may direct.

After the expiry of *five years* from the dissolution of the company, no responsibility will rest on the company, the liquidator or any person to whom the custody of the books and papers has been committed, by reason of any books or paper not being forthcoming for any person claiming to be interested therein (Section 550).

The Central Government may, by rules, prevent for such period (not exceeding 5 years from the dissolution of the company) as the Central Government thinks proper, the destruction of the books and papers of a company which has been wound up and of its liquidator. Also it can similarly enable any creditor or contributory of the company to make representation to the Central Government in respect of the matters aforementioned and to appeal to the Court from any direction which may be given by the Central Government in the matter [Section 55) (3)]. If any person acts in contravention of any such rules or of any direction of the Central Government thereunder, he shall be punishable with imprisonment for a team extending to 6 months or with fine extending to Rs. 5,000 or with both [Section 550 (4)],

Information as to pending Liquidation (Section 551): You may come across a situation where the winding-up of a company has commenced but it has not been possible to *conclude* it within *one year* since its commencement. In such a case, the liquidator is required to file in court (in case of a winding-up by or subject to supervision of the Court) or with the Registrar (in case of a voluntary winding up) a statement in the prescribed form. The statement is to contain the prescribed particulars and to be duly audited or by a qualified auditor with respect to the proceedings in, and the position of, the liquidation. This statement is to be filed within two months of expiry of such a year; from this stage till the conclusion of the winding-up, this statement is to be filed at the intervals of not more than one year, or such shorter intervals as may be prescribed. The liquidator has to comply with these requirements unless he is exempted from so doing wholly or partly by the Central Government [sub-Section (1)].

A copy of the statement filed in Court as aforesaid has to be simultaneously filed with the Registrar who shall keep it along with the other records of the company [section (2)].

The said statement is open to inspection by any person stating himself in writing to be a creditor or contributory or his agent at all reasonable time on payment of the prescribed fee. He may also have a copy of or an extract from, the statement if he so wants [sub-Section (3)].

The Section provides for the following penalties namely—(a) fine up to Rs. 500 for every day of the liquidator's failure in complying with the requirement of the Section; (b) imprisonment up to six months or fine up to Rs. 1,000 or both for the liquidator's wilful default in causing the statement to be audited by a qualified auditor; (c) sentence provided in Section 182 of the Indian Penal

Code for the person untruthfully stating himself to be a creditor or contributory of the company for inspecting the aforementioned statement or receiving copy or extract thereof [sub-Section (4) & (5)].

Liquidators duty as to paymant into bank :—In terms of Section 552, every Official Liquidator is bound to pay all moneys which he receives as liquidator of the company into the public account of India in the Reserve Bank in such manner and at such times as may be prescribed.

Under Section 553, every other liquidator than the Official Liquidator shall pay such money into a scheduled bank to the credit of a special banking account. This account is to be described as "the Liquidation Account of Company" "Company Limited"/"Company Private Limited". He has to make this payment into the bank unless he is otherwise ordered by the Court for reasons of advantage to the creditors or contributories. However, he cannot retain with himself any sum in excess of Rs. 500 or such other account as the Court may authorise, for more than 13 days. If he retains the amount beyond this period, he must give a satisfactory explanation for such retention. If he fails to give any satisfactory explanation, he is obliged to pay interest at 12% per annum and such other penalty as may be prescribed by the Registrar. He shall be further liable to disallowance of all or such of his remuneration as the Court may think fit. For the said retention of money beyond the stipulated amount and period, he shall also be liable to be removed from his office by the Court as well as to pay expenses occasioned by reason of his default.

According to Section 554, neither the Official Liquidator nor any other liquidator can pay any moneys received by him in his capacity as such into any private banking company.

Unpaid dividend, and undistributed assets to be paid into Companies Liquidation Account (Section 555) : Where a company is being wound up the liquidator shall forthwith pay into the public account of India in the Reserve Bank in a separate account described as the "Company's Liquidation Account" all the money which he has either in his hands or under his control and which represents—(a) dividends payable to any creditor which had remained unpaid for 6 months after the declaration thereof; or (b) assets refundable to any contributory, which have remained undistributed for 6 months after the data on which they became refundable. Similarly, on the dissolution of a company, the liquidator must pay any unpaid dividends or undistributed assets at the date of the dissolution into the account aforementioned [sub-Section (2) & (3)].

While making the aforesaid payment, the liquidator shall furnish to such officer as appointed by the Central Government with a statement in the prescribed form. Such a statement must set forth the nature of the sums, the names and the last known addresses of the persons entitled to participate therein, the amount to which each is entitled thereto and nature of the claim thereto, and other prescribed particulars.

For the money paid into the Reserve bank the liquidator is entitled to a receipt from the former. Such a receipt is an effectual discharge of the liquidator's obligation in this regard [sub-Section (4)]

Where the company is being wound up by the Court, the liquidator shall make the payment mentioned above by transfer from the account referred to in Section 552 [sub-Section (5)].

Visualise a situation where the company is being wound up voluntarily or subject to the supervision of the Court. In such a case, the liquidator shall, when filing a statement pursuant to Section 551(1) indicate the sum of money which is payable to the Reserve Bank under Section 555 (1) & (2) as unclaimed dividends or undistrbuted assets and which he has not in his hands for 6 months preceding the date to which the statement is brought down, and pay that sum into the company's Liquidation Account within 14 days from the date of filing the statement [sub-Section (6)].

Any person entitled to moneys which had been paid into the company's Liquidation Account, may apply to the Court for an order for payment thereof. The Court may order payments, if it is satisfied that the money is due to the applicant. Prior to this order being made, the court shall, however, serve a notice on an officer who might have been appointed by the Central Government is this connection, asking him to show cause why the order should not be made [Sub-Section (7)]. This provision clearly shows that the person entitled to participate in the sums so paid up into the company's Liquidation Account do not lose their right for ever,

It should, however, be noted that the person also may apply to the Central Government, instead of the Court as referred to above, for an order for paymant of the money. If no application for such a payment has already been made to the Court, the Central Government may make the order for payment to that person of the sum due (after taking such security from him as it may think fit) provided it is satisfied with a certificate to be given in this regard by the liquidator of the Official Liquidator, or otherwise [Sub-Section (7)].

It is necessary that if the moneys paid into the company's liquidation account have remained unclaimed for years, those will have to be transferred to the general revenue account of the Central Government. Even thereafter any person entitled thereto may apply to the Central Government [Sub-Section (8)].

Should the liquidator, instead of putting the money into the company's Liquidation Account, retain it, he must; (i) pay intrest @ 12% per annum on the sum retained, subject, however to the Central Government's power to remit wholly or partly to the amount of interest, (ii) pay any expenses incurred as a result of his default: and (iii) where the winding-up is by or under the supervision of the Court, be deprived of his remuneration partly or wholly and be removed from his office [Sub-Section (9)].

Dissolution declared void : Within two years of the dissolution of a company the Court may, on an application being made by the liquidator or any other person interested, make an order declaring the dissolution to have been void. A certified copy of the order must be filed with the Registrar by the person on whose application order was made, within 30 days (Section 559).

Winding-up of unregistered Companies : An "unregistered company" includes any partnership, association or company consisting of more than seven members at the time when the petition for winding-up the partnership, etc, is presented before the Court. It does not include, however, a railway company incorporated by an Act of Parliament or other Indian Law or ony Act of Parliament of the

United Kingdom, or a company registered under the Companies Act, 1956 or under any previous Companies Law (Section 582).

An unregistered company may be wound up under the Act and all the provisions of the Act with respect to winding-up apply to an unregistered company, with the following exception and additions :

(a) To determine a Court's jurisdiction in the matter of its winding-up, the principal place of business is, for all the purposes of the winding-up deemed to be the registered office of the company ;

N.B. [The registered office of a company is the determining factor for the Courr's juridiction in this regard].

(b) An unregistered company is not to be wound up under the Act voluntarily or subject to supervision. It is to be wound up by the Court,

(c) The circumstances in which an unregistered company may be wound up are as follows—

(i) if the company has been dissolved, or has ceased to carry on business, or is carrying on business for the purpose of winding-up its affairs :
(ii) if the company is unable to pay its debts ; or
(iii) if the court is of opinion that it is just and equitable that the company should be wound up.

An unregistered company is deemed to be unable to pay its debts in the following circumstances ;—

(i) if a creditor (as assignee or otherwise), to whom a sum exceeding Rs. 500 is due, has submited a demand in writing to the company asking it to pay him the sum due and the company has neglected to pay it or to secure or to compound for it for 3 weeks after the service of the demand ;
(ii) if any suit or legal proceeding has been instituted against any member for any debt or demand due from the company and a notice thereof has been communicated to the company and the company has not, within 10 days of the service of the notice, paid secured or compounded for the debt ;
(iii) if the execution or the process against the company has been returned unsatisfied in whole or in part :
(iv) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

Every person, in the event of an unregistered company being wound up who is liable to pay or to contribute to the payment of—(a) any debt or liability of the company, (b) any sum for the adjustment of the rights of the members among themselves or (c) the costs, charges and expenses of the winding up, shall be deemed to be a contributory. He will be liable to contribute to the asset of the company all sums due from him in respect of any liability to pay or contribute. If a contributory dies or becomes insolvent, the provision of the Act as regards legal representatives or assignees also will be applicable (Section 585),

The provisions of the Act with regard to staying and restraining suits and legal proceedings against a company at any time after the presentation of the petition for winding up but *before a winding up order* is made, shall in the case of an unregistered company, where the application to stay or restrain is made by a creditor, extend to suits and legal proceedings against any contributory (Section

586). If, however, a winding up order has been made, no suit or legal proceedings can be commenced or proceeded with against a contributory for the debt of the company without leave of the Court (Section 587).

SELF-EXAMINATION QUESTIONS

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper, The answers to these questions are not required to be written out or to be submitted for evaluation. Answers are at the end.

1. The articles of a prosperous company are silent as to its duration. Its members desire to wind it up by passing an ordinary resolution. Can such a manner for winding up be considered in accordance with the provisions of the act ?
2. In the course of the voluntary winding-up, the liquidator applies to the Court for an increase in his remuneration on the basis of liquidator continuing beyond the expected period. Can the liquidator succeed ?
3. The company, while appointing the liquidator for its winding-up, empowered him with all powers of management. The liquidator wanted to sell the company's property by public auction but, the Board of Directors directed him to sell the properties to their nominees. Could the liquidator refuse to accede to their request ?
4. The liquidator refused to treat sales tax in arrears as well as that assessed after the winding up as preferential payments under Section 530. Could the liquidator do so ?
5, In the course of winding-up it was found that the manager of a company had misapplied certain sums of the company. The manager was prosecuted for misfeasance under Section 543. In defence, he pleaded that he honestly and reasonably believed that the investment was within his power. Can the Court exonerate him from such liability ?
6. The liquidator paid into company's liquidation account the unpaid dividends which A was entitled to. These were not claimed for fifteen years by A on account of his absence from India and the same were transferred to the General revenue account of the Central Government, Later on, he applied to the Central Government for payment thereof. Could such a right be exercised after the expiry of fifteen years ?
7. A company was voluntarily dissolved in accordance with the provisions of the Act. After expiry of one year thereof, the liquidator of the company who conducted the winding-up, applied to the Court to declare the dissollution void as certain matters, which were materials for proper winding-up were not disclosed to him earlier. Could he do so ?
8. An auditor is prosecuted for destroying the company's books of account even though the company is not being wound up. Can he be prosecuted ?
9. A transfer of company's property is made within one year before the passing of resolution for the voluntary winding up. This is made in favour of a purchaser who buys in good faith and for valuable consideration. Can the liquidator succeed in getting the transaction cancelled ?

Answers :

1. No. 4. Yes 7. Yes.
2. No. 5. Yes 8. No.
3. No. 6. Yes 9. No.

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL

F. S. P. (N) Adv. CL—6

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FINAL COURSE (N)

ADVANCED COMPANY LAW

STUDY – VI

This Study Covers

CONSTITUTION AND POWERS OF ADVISORY COMMITTEE

EMPLOYEES' SECURITIES AND PROVIDENT FUNDS

RECEIVERS AND MANAGERS

MISCELLANEOUS PROVISIONS

APPLICATION OF COMPANIES ACT, 1956 TO COMPANIES FORMED AND REGISTERED UNDER PREVIOUS COMPANIES LAW.

COMPANIES AUTHORISED TO REGISTER UNDER THE ACT,

Prescribed Reading : 1. Lectures on Company Law by S. M. Shah, 18th Edition.

2. Principles of Company Law by M. C. Shukla and S. S. Gulshan.

3. Indian Company Law by Avtar Singh. Fourth Edition.

Substitution of Advisory Committee for Advisory Commission : The Companies Act as amended in 1960 provided for the appointment of an Advisory Commission for advising the Central Government in the administration of the Act specially in dealing with the applications made to it under certain Sections of the Act. These provisions were included in Section 410. On the Act being amended in 1965, the Advisory Commission was substituted by an Advisory Committee consisting of not more than five persons suitably qualified. The function of this Committee is to advise the Central Government and the Company Law Board in respect of such matters arising out of the administration of the Companies Act as may be referred to it by Government or the Board.

Since the Advisory Committee did not have any statutory existence or powers, all matters pending with the Advisory Commission, on the amendment of the Act, were transferred to the Central Government for disposal. Moreover, Section 640 B was enacted to prescribe the procedure for making applications to the Central Government pursuant to several Sections of the Companies Act in substitution of the Section 412. Section 640 B provided as follows :

(1) Every application made to the Central Government under Sections 259, 268, 269, 310, 311, 326, 328, 329, 332, 343, 345, 346, 352, 408 or 409 shall be in such form as may be prescribed.

(2) (a) Before any application is made by a company to the Central Government under any of the Sections aforesaid, there shall be issued by or on behalf of the company a general notice to the member thereof, including the nature of the application proposed to be made.

(b) Such notice shall be published at least, once in a newspaper in the principal language of the district in which the registered office of the company is situated and circulating in that district, and at least once in English newspaper circulating in that district.

(c) Copies of the notices, togethhr with a certificate by the Company about the due publications thereof shall be attached to the application.

Contracts by Agents Where Company is Undisclosed Principal : Section 416 prescribes a special rule with regard to contracts entered into on behalf of a public company (or a private company which is a subsidiary of a company) by the manager or other agent, in which the company is an undisclosed principal. It provides that any such person, when entering into such a contract, must draw up a memorandum of the terms, of the contract, at the time the contract is entered into, specifying the names of the persons, with whom, it has been done. The memorandum must be placed in the record of the company and copies thereof must be sent to all the directors. Subsequently, the memorandum should be placed before the Board at its next following meeting In the case of default, the contract, at the option of the company, shall be voidable as against the company, and the person who had entered into the contract or every officer of the company in default, as the case may be, would be liable to penalty which may extend to Rs. 200/-. However, the Central Government may grant relief under Section 633 to an officer in default, if it appears to it that the person has acted

honestly and reasonably and that, having regard to all the circumstances of the case, he ought fairly to be excused. The relief may be granted either wholly or partially.

Employees' Securities and Provident Funds: Sections 417-420 of the Companies Act, 1956 deal with the Employees' Securities and Provident Funds. They provide as follows :—

(a) Any money or security deposit made by an employee of a company under the terms of his contract of services, must be kept or deposited by the company within 15 days from the date of deposit in a Post Office Savings Bank Account or in a special account to be opened with the State Bank of India or a Scheduled Bank or, where the company itself is a Scheduled Bank, in a special account to or be opened by it at or with the State Bank of India or any other Scheduled Bank.

The Company must not utilise any portion of such moneys or securities except for the purposes agreed to, in the contracts of service (Section 417).

(b) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or received or accruing by way of interest or otherwise to such fund, within 15 days from the date of contribution, receipt or accrual should be deposited in a Post Office Savings Bank Account or in a special account in a Scheduled Bank or in the State Bank of India, or where the company itself is a Scheduled Bank in, a special account to be opened either in itself or in the State Bank of India, or in any other Scheduled Bank or suitably invested in securities mentioned or referred to in Section 20 (a) to (e) of the Indian Trusts Act, 1882 [Section 418 (1)].

(c) In no case will an employee be entitled to receive an interest in respect of the amount standing to his credit at a rate in excess of that yielded by the investment made in accordance with the requirements aforementioned [Section 418 (2)].

(d) An employee may obtain advances from the fund or withdraw money standing to his credit in the fund, if the fund is a recognised provident fund within the meaning of Section 58-A (a) of the Income-Tax Act 1922 or if the rules of the fund contain provisions corresponding to the rules 4 to 9 of the Income-Tax (Provident Funds Relief) Rules [Section 418 (3)].

Tutorial Note: Section 2(38) of the Income-Tax Act, 1961 defines a recognised provident fund, and the relevant rules thereto are provided in Part XII (Rules 67 to 81) of the Income-Tax Rules, 1962.

(e) If a trust has been created by a company with regard to any provident fund, the company must collect and pay the employee's contributions together with its own contributions to the trustees within 16 days from the date of their collection. Thereafter the trustees will be obliged to comply with the aforesaid requirements as regards their investment [Section 418 (4)].

An employee, on making request to the company or to the trustees, as the case may be, may look into the receipts issued by banks for provident fund money

and securities deposited with them as well as the bonds or securities in respect of investments in trust securities (Section 419). But such a right can be exercised only by an existing employee and not by an ex-employee or past employee or a person whose services have been terminated. (The State vs., Girdharilal Bajaj, 63 Bom. L.R. 743).

Any contravention of the provisions of Sections 417, 418 & 419 by an officer of the company or by a trustee of the provident fund will render him punishable with imprisonment for a period extending up to six months or with fine extending to Rs. 1,000 (Section 420).

The status of Trust continues, even though the balance in the Fund has been misapplied. Even if the balance standing to the credit of the provident fund, or the amounts deposited by the employees, is wrongfully inverted and profits accrue to the company out of these wrongful investments the character of trust attaching to the fund is not altered. Neither would such a use have the effect of converting it into a loan. It will continue to remain a fund irrespective of the fact that the employees knew that the fund had been wrongfully employed by the company in its own business. It would not preclude the employees from claiming the funds from the company when it is in liquidation, as preferential creditors. This is because the company shall continue to be the trustee in respect of these funds and will not become mere debtor. (Alliance Bank of Simla Ltd, 1924, 21 C.W N. 721, Re, Bengal Zamindari and Banking Co, 1937, 2 Cal. 305).

Receivers and Managers : A receiver of the property of a company should furnish to the Registrar of Companies every half year and also on his ceasing to act as receiver an abstract of receipts and payments during the period to which the abstract relates in Form No. 36 of the Companies (Central Government's) Rules and Forms, 1956. Moreover, on the appointment of the Receiver, an entry to this effect should appear in every invoice, order for goods or business letter issued by or on behalf of the company or the receiver. In the event of these provisions being contravened, the company and every officer thereof, who is in default, shall be liable to pay a fine of Rs. 200 (Sections 421-423).

Security for Costs by Limited Company : When a limited company is the plaintiff of petitioner in a suit or in any other legal proceedings if the Court having the jurisdiction in the matter has reason to believe that the company will not be able to pay the cost of the defendant, if, he is successful in his defence, it may require the company to furnish sufficient security for costs, and may stay all proceedings until the security is provided (Section 632). It has however been held that it is open to a company to sue in *forma pauperis*. In such a case, the question of payment of security into Court will not arise.

Penalty Where No Specific Provision has been made Elsewhere in the Act : When a company or any other person transgresses any provision of the Act, and for such transgression no punishment has been provided elsewhere in the Act the company and every officer thereof who is in default, shall be punishable with fine extending up to Rs. 500 and where the contravention is a continuing one, with a further fine extending up to Rs. 50 for every day during which the contra-

shall be continuous. A similar punishment will also come for contravention of any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted (Section 629 A).

Enforcement of Duty of Company to Make Returns, etc to Registrar : Where a company is required under the Act to file or register with or deliver or send to the Registrar any return, account or other document or notice, and the company defaults in doing so for period of 14 days, then any member or creditor of the company or the Registrar may make an application to the Court for such compliance. On such an application, the Court may direct the compay and any officer thereof to make good the default within such time as may be specified in the order. But this provision does not affect the levying of any penalty on the company or its officer in respect of any such default (Section 614).

Power of the Court Trying Offences Under the Act to Direct the Filing of Document with Registrar : Any Court trying an offence for a default in compliance with any provision of the Act, which requires a company or its officers to file or register with or deliver or send to the Registrar any return, account or other document, may, at the time of sentencing, acquitting or discharging the accused, as the case may be, compel such compliances by order on payment of the fee including the additional fee required to be paid under Section 611 within the time specified in the order. If such an order is not complied with, the defaulting officer or employee of the company shall be liable to be punished with imprisonment for a maximum period of 6 months or with fine, or with both (Section 614 A). Further, if a director fails to comply with order of the Court under the Companies Act to submit a return to the Registrar within the stipulated time, he shall be guilty of contempt of Court and the High Court has power to punish the director for contempt of the Court [State of U.P. vs , Tikka Ram Uniyal (1964) 34 Comp Cas 5].

Power of the Central Government to Appoint Company Prosecutors and to Appeal Against Orders of Acquittal : For the conduct of prosecution arising in the administration of the Act, the Central Government may appoint generally or in any case or for any specified class of cases in any local area, one or more persons as company prosecutors Such prosecutors will have the same powers and privileges as those enjoyed by public prosecutors under the Code of Criminal Procedure, 1898 (Section 624A).

The Central Government also may direct any company prosecutor; appointed in the circumstances aforementioned or authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any Court other than a High Court. Such an appeal will be deemed to have been validly presented to the appellate Court (Section 624B)

Modification of the Act in its Application to Nidhis and Mutual Benefit Societies : Nidhi or Mutual Benefit Society means a company which he Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be, and direct that any of the provisions of the Act specified in the notification : (1) shall not apply to any Nidhi or Society;

or (ii) shall apply to any Nidhi or Society with such exceptions, modifications and adaptations as are specified in the notification. A copy of such a notification must be placed before each House of Parliament at the earliest, subsequent to its issue (Section 620A).

Tutorial Note : Nidhis or Mutual Benefit Societies are companies registered with objects to enable the members to save money, to invest their savings and to secure loans at favourable rates.

Enforcement of Orders : Any order made by a Court under the Companies Act is enforceable in the same manner as a decree made by the Court in a suit pending with it (Section 634).

Enforcement of Orders of Company Law Board : Section 634A which has been added anew by the Companies (Amendment) Act, 1977 (which came into force with effect from 24 12-77) provides that any order made by the Company Law Board under Section 17, Section 18, Section 19, Section 79, Section 141 or Section 186 may be enforced by the Board in the same manner as if it were a decree by a Court in a suit pending therein and it shall be lawful for that Board to send in the case of its inability to execute such order, to the Court within the local limits of whose jurisdiction : (a) in the case of an order against a company the registered office of the company is situated ; or (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

Enforcement of Orders of One Court by Other Courts : Where, the order of the Company Court, which is deemed to be decree, is to be executed outside its jurisdiction, a certified copy of the order has to be produced before that other Court [Section 635 (1)]. The production of such certified copy shall be sufficient evidence of the order. Upon the production of such certified copy, the Court shall take the requisite steps for enforcing the order, in the same manner as if it had been made by itself (Section 635 (2) & (3)]. Where, any order made by the Company Law Board under Section 17, Section 18, Section 19, Section 79, or Section 186 is required to be enforced by a Court a certified copy of the order shall be produced to the proper officer of the Court required to enforce the order and the provisions of Sub-sections (2) and (3) shall, as far as may be, apply to every such order in the same manner and to the same extent as they apply to an order made by a Court [Section 635 (4) added by the Amendment Act, 1977].

Provisions for Removal of Administrative Difficulties

(1) *Protection of Acts Done in Good Faith* : No suit prosecution or other legal proceedings shall lie against the Government or any officer thereof or any other person in respect of anything which is done in good faith or is intended to be done in pursuance of the Act or any rules or orders made thereunder, or in respect of the publication by or under the authority of the Government or such officer of any report, paper or proceedings The objective of such a provision is to indemnify persons acting in good faith, pursuant to the Act, who may not be Government officers and in respect of publication made by or under

the authority of Government or such officers of such report, paper or proceeding (Section 637A).

(*Exemption from Disclosure of Information in Certain Cases* (*Sec. 633 A.A.*) The Registrar, any officer of the Government or any other person cannot be forced under any circumstances to disclose to any Court or other authority whence he got any information which has led the Central Government to direct a special audit under Section 233 A or to order an investigation under Section 235, 237, 247, 248 or 249 or which is or has been material or relevant in connection with such special audit or investigation.

It is a provision intended to ensure that the flow of information is not obstructed by the identity of the sources being revealed.

(3) *Power of the Central Government or Company Law Board to Accord Approval on Application, etc, Subject to Conditions and Payment of Prescribed Fees* (*Sec. 637 A*): When the Central Government or Company Law Board is required or authorised by any Provision of the Act (i) to accord approval, sanction, confirmation or recognition to any matter, or (ii) to give any direction in relation to any matter, or (iii) to grant exemption in relation to any matter, then the Government or Company Law Board may in the absence of anything to the contrary contained in such or any other Provision of the Act, do so, subject to such conditions and limitations as it may think fit to impose. If however, such conditions and limitations are contravened, the Central Government or the Law Board may rescind or withdraw them.

Every application made for any of the aforesaid purposes must be accompanied by such fee not exceeding Rs 100 as may be prescribed The Government and the Company Law Board is authorised to prescribe fees for application in respect of different matters, or in the case of applications made by companies for applications by different classes of companies.

All the aforementioned powers are contingent in the sense that the Central Government can exercise them only if these are required under any Provision of the Act for according approval, *etc.* to or in relation to the matter at hand. Unless such an authority exists, these powers cannot be exercised. For instance information as regards income received by director from other companies and the earning of the members of his family are not matters considered relevant for purpose of inquiry against a company. The Government thus cannot authorise their collection. (Canara Workshops Ltd vs the Union of India (1966) 36 Comp Cas 63) Unconditional orders cannot be rescinded, since those do not fall within the purview of Section 637A (Nava Samaj Ltd. vs, Registrar of Companies 1965, 1 Comp L J. 339)

(4) *Power of Central Government to fix a Limit with Regard to Remuneration*: According to Section 637 AA the Central Government may—while according its approval to any appointment or re-appointment of managing or whole-time director under Section 269 or to any appointment or to any remuneration under Section 309 or Section 310 or Section 387—fix the remuneration of the person so appointed or the remuneration, as the case may be, within the limits specified

in this Act at such amount or percentage of profits of the company, as it may deem fit. But while fixing this remuneration, the Central Government shall have to take into account the following factors, (a) the financial position of the company (b) the remuneration or commission drawn by the individual concerned in any other capacity, including his capacity as a sole selling agent, (c) the remuneration or commission drawn by him from any other company, (d) Professional qualifications and experience of the individual concerned, (e) public policy relating to the removal of disparities in income.

(5) Power to Condone Delays : The Central Government may condone the delay in filing a document for reasons to be recorded in writing, for example, in the case of failure to make application or file document required to be made to or filed with the Government or with the Registrar (Section 637B)

(6) Jurisdiction to Try Offences : An offence against the Act shall be tried at least by the Court of Presidency Magistrate or a magistrate of the First Class (Section 622).

Inasmuch as a company is a judicial person, it can be prosecuted like any other individual; also it can be convicted and fined, if it is found guilty. Suppose an offence is punishable under the Act only by fine and nothing else. In such a situation, if the offence is committed within a Presidency town, it would be punishable upon summary conviction by any Presidency Magistrate of that town (Section 623).

(7) Compensation in the Case of Frivolous and Vexatious Prosecution : For the institution of frivolous and vexatious prosecution against a company or an officer thereof by a shareholder, he may be ordered by the trying Magistrate to pay to the aggrieved party by way of compensation an amount not exceeding Rs 1000. In case of default in payment of the said amount the shareholder may be ordered to undergo a simple imprisonment for a maximum period of two months. The shareholder, however, shall have the right to appeal against such order (Section 625).

(8) Power of the Central Government to Alter Table and Forms in the Schedules Except Schedules XI & XII and to Alter or Amend the Forms : The power of the Central Government in this regard is limited only by the provision that the alterations made must be first published in the Official Gazette. Only after notification, the alterations become effective. Moreover, every such alteration must be laid before each House of Parliament (Section 641).

(9) Companies not Entitled to Fundamental Rights Under the Constitution : A company not being a citizen, no petition under Article 32 or 226 of Constitution can be entertained for any infraction of any fundamental right of citizen of India, which the company claims The doctrine of piercing the veil of the Corporation does not apply to such a case As a result, it cannot be argued that it is in fact the shareholders, but not the company, who have moved the Court under Article 32. A company cannot be indirectly allowed by relying on the doctrine of lifting the veil to achieve a thing which it cannot directly do [Tata Engineering and Locomotive Co. Ltd. vs. The State of Bihar. (1964)I.S.C.J. 666 ; State Trading Corpora-

FOREIGN COMPANIES

Companies which are incorporated in foreign countries but have offices and places of business in India are described as foreign companies. They have to comply with certain provisions of the Act.

Application of Sections 502 to 602 to Foreign Companies (Section 591): All these sections will apply to all foreign companies, *i.e.*, companies falling under the following two classes, namely—(a) companies incorporated outside India which after the commencement of this Act, establish a place of business within India; and (b) companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of of business within India at the commencement of the Act [Sub-Section (1)].

It may so happen, that not less than 50% of the paid-up share capital—whether equity or preference or partly equity and partly preference—of a foreign company having an established place of business in India is held by one or more citizens of India or one or more bodies corporate incorporated in India, whether, singly or in the aggregate. In such a case, the said company shall comply with such of the provisions of the Act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India [Sub-Section (2) as inserted by the 1974 Amendment Act)].

Documents, etc., to be Delivered to the Registrar by Foreign Companies: Foreign companies which after April 1, 1956 establish a place of business in India must, within 30 days, form the date, file with the Registrar having jurisdiction over New Delhi (Section 597) and also with the Registrar of the State in which the principal place of business of the company is situated :

(a) a certified copy of the charter, statutes or memorandum and articles of the company or other instruments constituting or defining the constitution of the company, and if the instrument is not in the English language certified translation thereof ;

(b) the full address of the registered or principal office of the company ;

(c) a list of the directors and secretary, of the company, containing the particulars mentioned in Section 592 (2).

In respect of each director (when an individual), this list must contain his present name and surname in full, his former name or names or surname or surnames in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin and his business occupation (if any), or if he has no business occupation but holds any other directorship or directorships, particulars thereof. If the director is a body corporate, the list must contain its corporate name and registered or principal office and the full name, address, nationality and the nationality of origin if different from that nationality or each of its directors. In respect of the secretary or each of the joint secretaries (if there be any) (when an individual), the list must contain his present name and surname, and former name(s) or surname(s) and his usual residential address in

the secretary is a body corporate, its corporate name and registered or principal office ;

(d) the name and address or the names and addresses of some one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company, and

(e) the full address of the office of the company in India which is to be deemed its principal place of business in India.

Under Rule 16 of the Companies (Central Government's) General Rules and Forms, 1956, a copy of any charter, statutes, memorandum and articles, or other instrument constituting or defining the constitution of a company must be duly certified to be true copy. It must be certified, in the case of a company incorporated outside the Commonwealth by (a) an official of the Government to whose custody the original of the document is committed or (b) a Notary of such country or (c) an officer of the company. The signature or seal of the official mentioned in (a) or (b) is required to be authenticated by diplomatic or Consular Officer empowered in this behalf under Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948, or, where there is no such officer by any one of the officials mentioned in Section 6 of the Commissioner of Oaths Act, 1889 or in any Act amending the same. The certificate of the officer of the company referred to above is required to be signed before a person having authority to administer an oath as provided by Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act or as the case may be by Section 3 of the Commissioner of Oaths Act, (the status of the person administering the oath in the latter case being authenticated by any official specified in Section 6 of the Commissioner of Oaths Act, or in any Act amending the same).

If the company is incorporated in any part of the Cammonwealth, the copy of the abovemetioned ducument must be certified as true copy by : (a) an official of the Government to whose custody the original of the document is committed (b) a Notary in that part of the Commonwealth, or (c) an officer of the company, on oath before a person having authority to administer oath in that part of the Commonwealth.

Under Rule 17 (*ibid*), the English translation of the documents to be filed with the Registrar in pursuance of Section 592, 593 or 605; must be certified to be correct. If the translation is made outside India it shall be authenticated by the signature and seal (if any) of the official having custody of the original or of a Notary of the country (or part of the country) where the company is incorporated. If the translation is made within India, it shall be authenticated by an advocate, attorney or pleader entitled to appear before any High Court or by an affidavit of the person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English. The documents pursuant to Section 592 are to be delivered in Form No. 44.

Return to be Delivered to Registrar Where Documents are Altered : Under Section 593 of the Act, if any alteration is made or occurs in : (a) the charter,

[illegible] constituting or defining the constitution of a foreign company; or (b) the registered principal office of a foreign company; or (c) the directors or secretary of a foreign company; or (d) the name or address of any person authorised to accept service on behalf of a foreign company; (e) the principal place of business of the company in India; then the company shall within the prescribed time deliver to the Registrar for registration a return containing the prescribed particulars of the alteration.

Rule 18 of the Companies (Central Government's) General Rules and Forms, 1956 prescribes the time, within which the particulars of alteration are to be filed. The notice of alteration in respect of item (a), (b) or (c) above, must be communicated to the Registrar on or before 31st January of the year following the year in which alteration was made or occurred; that in respect of item (d) or (e) within one month from the date of alteration.

Accounts of Foreign Company : Under section 594 (1), every foreign company in every calendar year must :

(a) Make out a balance sheet, and profit and loss account relating to his Indian business in such form containing such particulars and including or having annexed thereto such documents (including, in particular, document relating to every subsidiary of the foreign company) as under the provisions of the Act it would, if it had been a company within the meaning of the Act, have been required to make out and, lay before the company in general meeting; and

(b) deliver three copies of those documents to the Registrar.

In regard to a foreign company having a branch in India, whose entire or almost the entire business related to India, to avoid preparation of separate Balance Sheet and, Profit and Loss Account in respect of the Indian business, it has been agreed to by the Department of Company Law Administration that if the world Balance Sheet, and Profit and Loss Account prepared by it in the country of incorporation was recast in the form prescribed in Schedule VI to the Companies Act, then such statement of accounts would be accountable in compliance with the provision of Section 594 (1) [4th Annual Report, para, 187]

Under Section 594(3), every foreign company shall send to the Registrar along with the documents required to be delivered to him under Sub-section(1), three copies of a list in prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in Sub-section (1) is made out.

The documents referred to Section 594(1) (a) & (3) are required to be delivered to the Registrar within 9 months from the date of closing of financial year of the foreign company to which the documents relate. This period may, however be extended for any special reason for a maximum period of 3 months [Rule 18A Companies (Central Government's) Rules & Forms, 1956].

Obligation to State Name of Foreign Company: It is also obligatory for every foreign company to (a) exhibit on the outside of its place of business in India its

[illegible] and the country in which it is incorporated and such an exhibition must be in English as well as in the local language, (b) state, in every prospectus inviting subscriptions in India, for its shares or debentures the country of incorporation, (c) cause the name of the company and its country of incorporation to be stated in legible English characters in all business letters, bill heads, letter paper, notices, advertisements and other official publications thereof.

If the liability of the members of the company is limited, the notice of the fact also must be stated in the prospectus, letter head, letter paper, *etc.* and to be conspicuously exhibited on the outside of every place where it carries on business in India, in legible English characters and also in legible characters of the language of the locality in which the office or place is situate (Section 595).

Service on Foreign Company : A necessity may arise for serving on a foreign company certain process, notice or other document. These would be seemed to have been sufficiently served if these are addressed to any person (whose name has been delivered to the Registrar under the foregoing provisions relating to foreign companies) and left at, or sent by post to, the address which has been so delivered. But if such name and address of a person resident in India has not been given to the Registrar or if at any time all the persons whose names and addresses have been so delivered are dead or have ceased to reside or refuse to accept service on behalf of the foreign company, then the document may be served on the company itself by leaving it at or sending it by post to, any place of business established by the company in India (Section 596).

Penalties : Section 528 prescribes a penalty for the company and every officer or agent of the company for non-compliance with any of the requirements mentioned above, extending to Rs. 1,000 and in the case of a continuing offence, with an additional fine extending to Rs. 100 per day, during which the default continues.

Effect of Company's Failure to Comply with the Provisions of Part XI of the Companies Act Relating to Companies Incorporated Outside India : Under Section 599 if a foreign company fails to comply with any of the foregoing provisions of Part XI, such a failure will not affect the validity of any contract, dealing or transaction entered into by the company ; it will be liable to be sued in respect thereof. But it cannot bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction until it has complied with the provisions of that Part.

Registration of Charges, Appointment of Receiver and Books of Account (Section 600) : The provisions of Part V of the Companies Act (Sections 124 to 145 shall apply *mutatis mutandis* to : (a) charges on properties in India, which were created by foreign company after 15-1-1937 ; and (b) charges on property in India which is acquired by any foreign company after 15-1-1937. Moreover, where a section is created or the completion of the acquisition of the property takes place outside India, then provisions of Section 125 (5) and the proviso to 127 (1) shall have effect as if the property (whosever situated) were situated outside India.

The provisions of Section 118 (pertaining to the right of debenture-holders

and members to have copies of memorandum shall apply mutatis mutandis to a foreign company [Sub Section (2)].

The Provisions of Section 209 (pertaining to books to be kept by a company shall be applicable to a foreign company to the extent of requiring it to keep at its principal place of business in India, the book of account mentioned in Section 209 with regard to moneys received and spent, sales and purchases made, and assets and liabilities in the course of or in relation to its business in India [Sub-Section (3) (a)].

On and from the commencement of the Companies (Amendment) Act, 1974 (*i.e.* 1-2-75), the provisions of Section 159 (relating to Annual Return to be made by company having a share capital) shall, subject to such modifications or additions as may be made therein by the rules made under this Act, apply to a foreign company which has an established place of business in India, as they apply to a company incorporated in India [Sub-section (3) (b) (i) as inserted by the aforesaid Amendment Act]. Further, on and from 1-2-1975, the provisions of Sections 209 209A, 233A and 233B (relating to : books of account to be kept by an indigenous company ; inspection of books of account, etc, under Section 209A inserted anew by the 1974 Amendment Act ; special audit; audit of cost accounts in certain cases) as well as Sections 234 to 246 (relating to : Registrar's power to call for information or explanation ; seizure of document by Registrar, investigation of company's affairs on application by members or report by Registrar ; application by members to be supported by evidence any power to call for security ; investigation of company's affairs in other cases ; prohibition of a firm, body corporate or association from being appointed as inspectors ; power of inspectors to carry investigation into the affairs of related companies or associates, etc, production of documents and evidence; seizure of documents by inspector ; inspector's report ; prosecution, application for winding-up of company or an order under Section 397 or 398 ; proceedings for recovery of damages or property ; expenses of investigation ; and inspectors' report to be evidence) shall so far as may apply to the Indian business of a foreign company as they apply to company incorporated in India (Sub-section (3) (ii) as inserted anew by the 1974 Amendment Act).

In applying the aforementioned Section (*viz.*, 124 to 145, 118 & 209), the Registrar and the registered office of the foreign company referred to in those Section, shall be the Registrar having jurisdiction over New Delhi and its principal place of business in India respectively.

N. B The prescribed form for the purpose of Section 600 is Form No. 55 of the Companies (Central Government's) Rules and Forms, 1956.

Fees for Registration of Documents : Such fees as may be prescribed have to be paid to the Registrar for registering any documents that are required to be filed with the Registrar (Section 601). Rule 20 of the Companies (Central Government's) Rules prescribes the fee at Rs. 30 for any document relating to a foreign company.

Registration of Prospectus : Section 605 declares that no person shall issue,

circulate or distribute in India any prospectus offering for subscription the shares in or debentures of, a foreign company incorporated or to be incorporated outside India irrespective of whether, or not it has established or will establish place of business in India, unless :

(i) before its issue, circulating or distributing of the prospectus in India a copy thereof, certified by the chairman and two other directors of the company as having been approved by a resolution of the Registrar ;

(ii) the prospectus states on the face of it that a copy thereof has been so delivered; and

(iii) there is endorsed on or attached to the copy; (a) the consent of an expert, if any, to the issue of the prospectus as required by Section 604 ; (b) a copy of any contract needed by clause 16 of Schedule II to be stated in the prospectus or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof ; and a statement setting out the adjustments referred to in clause 32 of the same Schedule. Likewise, under Sub-section (3) of Section 603, a person is prohibited from issuing to any one in India a form of application for shares in, or debentures of such a company or intended company, unless the form is issued along with the prospectus.

Students may note that : (i) a prospectus also comprises the document which according to Section 64, is deemed to be a prospectus and (ii) under section 608 (3) the expression 'prospectus' 'shares' and (debentures, in reference to foreign companies have the same meaning as when used in relation to a company incorporated under the Act.

Requirements as Regards Prospectus : In so far as foreign companies are concerned the provisions as regards prospectus requirements have been brought almost in line with the provisions applicable to companies incorporated in India, subject to minor modifications.

Under Section 603, the prospectus to be issued by an existing or intended foreign company in India must be dated and contain the following particulars : (a) the instrument constituting or defininig the constitution of the company ; (b) the enactments or provisions under which the company was incorporated ; (c) the address of the place in India where the said instruments, enactments. *etc.*, translation thereof in English, if they are in some other foreign language, can be inspected (b) the date on which and the country in which the company was incorporated ; and (e) whether, there is a place of business in India, and if so, the address of its principal office. The provisions contained in (a), (b) and (c) above, shall not be applicable, if the prospectus is issued more than 2 years after the company had become entitled to commence business. As in the case of the prospectus of a company incorporated in India, the prospectus of a foreign company too, must contain the matters laid down in Part I of Schedule II and set out the report specified in Part II of the Schedule subject always to the provisions of Part III of the Schedule

Furthermore, the penalty prescribed for contravention of any of the provisions

[illegible] in Section 603, 604 and 605 is imprisonment for a [illegible] up to 6 months, or a fine up to Rs. 5,000 or both (Section 606). Section 62 relating to civil liability for mis-statement in a prospectus is applicable also to a prospectus issued, circulated or distributed in India by a foreign company, with the substitution for references in Section 62 to Section 60 of this Act, of reference to Section 604 thereof (Section 607).

Government Companies

Section 617 of the Act defines a Government company as any company in which, not less than fifty-one per cent of the paid-up capital is held by the Central Government and partly by any state Government or Governments or partly by the Central Government and partly by one or more State Governments. It also includes a company which is a subsidiary of a Government company as thus defined.

Audit of Government Companies : Under Section 619 (2), the auditor of a government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor General of India. Even when the Government-holding is only a State Government or Governments, the Central Government will appoint the auditor.

You have read in connection with the Section 224 (IB) & (IC) in one of your Study Papers in Auditing : (i) that on or from the financial year next following the commencement of Companies (Amendment) Act. 1974, the appointment or re-appointment of any person or firm as auditor of a company is legally banned, if he or it is already holding the audit of either 20 companies, each of which has a paid-up share capital of less than Rs 25 lakhs or maximum, 10 companies each of which has a paid-up share capital of Rs. 25 lakhs or more plus 10 other companies, each of which having a paid-up share capital of not less than Rs. 25 lakhs (in all the numbers being 20in this case as well) ; and (ii) that is the number of such holding of company audit exceeds the aforesaid limit of 20 companies immediately before the commencement of the Amendment Act of 1974, the person or the firm concerned must intimate to the concerned company or companies his or its unwillingness to be re-appointed as the auditor from the financial year next following the commencement of the Amendment Act, within 60 days from commencement ; also he or it must simultaneously intimate the Registrar the names of the companies of which he or it willing to be re-appointed as the auditor and forward a copy of the intimation of such companies.

According to the proviso newly added to Section 619 (2) of the Act by the Companies Amendement Act of 1974 the aforesaid limits also apply in relation to the appoitment or re-appointment of an auditor of a Government Company by the Central Government on the advice of the Comptroller and Auditor-General of India.

The Comptroller and Auditor-General of India has power to direct the manner in which the accounts of Government companies are to be audited and to issue instructions to the auditor in regard to any matter relating to the performance of his duties and functions (Guru Gobinda Basu vs. Sankari Parasad Ghosal

I.S.C.J 259. The Comptroller and Auditor General is empowered to conduct a supplementary or test audit of the company's account through any person or persons whom he may authorise for that purpose of such audit the C.&A.G. may require information or additional information to be furnished to any person or persons so authorised on any matter generally or specially directed for.

The auditor of government company must submit a copy of his report to the Comptroller and Auditor General who has the right to either comment on or supplement the audit report in a manner he thinks fit. Thereafter, the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

The aforementioned provisions relating to audit also are applicable if the Government subsequently acquires 51% or more of the share capital in a company which previously was formed by private enterprise and the shares of which had been subscribed for by the public and the promoters in the first instance.

Annual Report on Government Companies (Section 619 A): The Central Government, where it is a member of a Government Company, shall cause an annual report on the working and affairs of that company to be prepared within 3 months of its annual general meeting whereas, the audit report is placed under Section 619 (5). As soon as this annual report is prepared the Central Government shall also cause to be laid before both Houses of parliament together with the copy of the audit report and comments on, or supplement to the audit report made by the Comptroller and Auditor General.

Where, in addition to the Central Government, any State Government is also member of the government company, that State Government shall cause a copy of the annual report (prepared as aforementioned) to be placed before the House or both Houses of the State Legislature, together with a copy of the audit report and the comments theron or supplement thereto.

Where the Central Government is not a member of a Government company every State Government which is a member of that company, or where only one State Government is a member of the company that State Government shall cause an annual report on the working and affairs of the company to be prepared within time mentioned above. As soon as the annual report is prepared, the State Government concerned must cause it to be laid before the House or both of Houses the State Legislature with a copy of the audit report and comments or supplement referred to above.

Provisions of Section 619 to Apply Certain Companies: These provisions shall apply to a company in which not less than 51% (impliedly, may be more) of the paid up share capital is held by one or more of the following or any combination thereof, as if it were a Government company: (a) the Central Government and one or more Government Companies; (b) and State Government (s) and one or more Govt. Companies; (c) the Central Government one or more State Government and one or more Government Companies; (d) the Central Government and one or more corporations owned or controlled by the Central Government; (e) the Central Government one or more State Governments and one or more corporations owned and controlled by the Central Government: (f) one or more

corporations owned or controlled by the Central Government or the State Government ; (g) more than one Government Company (section 619B inserted anew by the 1974 Amendment Act).

Application of the Act to Insurance, Banking, Electricity Supply and Other Companies Governed by Special Acts : The provisions of the Companies Act shall apply (a) to insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 ; (b) to banking companies, except, in so far, as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949 ; (c) to companies engaged in the generation or supply of electricity except in so far as the said provisions are inconsistent with the provisions of the Electricity (Supply) Act ; (d) to any other company governed by any special Acts, for the time being in force except in so far as the said provisions are inconsistent with the provisions of such special Acts; and (e) to such body corporate incorporated by any Act for the time being in force as the Central Government may, by notification in the Official Gazette specify in this behalf, subject to such exceptions, modifications or adaptations or may be specified in the notification [Section 616 (a) to (e)-the last clause *viz.*, (e) being added to the Section by the 1974 Amendment Act].

Power of the Central Government to Modify the Act Relating to Government Companies (Section 620) : The Central Government may, by notification in the Official Gazette, direct that any of the provisions of the Act, (with the exceptions of Sections 618, 619 and 619A) either shall not at all, or shall, subject to such exception, modifications and adaptations as may be specified, apply to a Government company.

But the power of the Central Government aforementioned is not an unfettered one ; it is subject to the control of Parliament. A copy of every notifications proposed to be issued under Sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses. (As amended from 24-12-77).

Government Company not a Public Body or Public Authority : The mere fact that the company is wholly Government owned does not clothe it with the character of a 'public body' or a "public authority". Therefore, it cannot exercise any authority as a public body ; it does not become, and cannot be regarded as a public body (Lakshmi v, Neyveli Lignite Corporation Ltd. 1966, 6 Comp. Cas. 197). It was held in that case that where, an employee was placed under a suspension on the basis of a departmental enquiry conducted by the employee of a defendant Corporation, it was not feasible for such an employee to apply for a *writ of certiorari* against the Corporation, inasmuch as such a Corporation is not a

public authority and proceedings, thus, were only a domestic tribunal of a private body. As such, this could not be challenged under Article 226 of the Constitution of India

Guarantee Company : It is a company which has two features in common with other companies. These are :

(i) The company has a legal personality :

(ii) The liability of the members is limited. In the case of a company having share capital, it is limited by the nominal amount of shares held by each member and in case of a company not having share capital, by amounts of guarantees undertaken by the members, i.e. the amounts they shall contribute in the event of the company being wound up, for payment of its debts.

'It is convenient form of organisation for associations such as clubs, chambers of commerce, trade associations, societies set up for carrying on charitable work, made under Section 25 may be permitted by the Government not to have the word or words 'Private Limited' or "Limited' as a part of its name.

The advantages of guarantee company are as follows :

(i) It becomes a separate entity and can own property, enter into contracts sue or be sued in regard to its contracts and transactions, etc.

(ii) In respect of the transactions of the company, no personal liability is incurred by the members of the company or its Board of directors or Committee of the management. If at all, their liability aries only on winding up.

The forms of memorandum and articles of association of a guarantee company not having a share capital as well as of a guarantee company having a share capital are contained in Tables C & D of Schedule I respectively. They may adopt these forms either in toto or as near thereto as the circumstances warrant (Section 29.)According to the proviso to Section 29 nothing shall be deemed to prevent a company from including any additional matters in its articles in so for as they are not inconsistent with the provisions contained in the Form in any of the Tables C & D adopted by the company.

Whereas, a company having a share capital can, according to Section 125, create a charge on its uncalled capital, a guarantee company cannot create a charge on the amount, which can be called up from its members only in the event of winding up [Re Irish Club Co. (1953) W. N. 127].

A guarantee company having a share capital may issue redeemable preference shares if authorised by its articles (Section 80), also share warrants to bearer if authorised by the articles but with the previous approval of the Central Government (Section 114).

As in the case of any other limited company, the memorandum of a guarantee company, if it has a share capital, must also contain the amount of the share capital with which the company proposes to be registered and division thereof into shares of a fixed amount (Section 13 (4)].

It is incumbent upon a guarantee company to register its articles along with the memorandum (Section 26). If it has share capital it may adopt Table D. Its article must state the number or numbers with which it is proposed to be registered [Section 27 (2)]. It is an index to the creditors of the company as regards the amount of guarantee on which they can rely as a security. If the number of members is increased, a notice of the increase is given to the Registrar within 30 days after the passing of resolution authorising the increase (Section 97).

By construction of Section 165 (1), a guarantee company, not having a share capital need not hold statutory meeting or forward the Statutory report to the members. It is obligatory on the part of a guarantee company to keep a register of members and a register and index of debentureholders (Section 150 and 151), a register of directors etc. (Section 303) as well as a register of charges (Section 125). It must give notice to the Registrar of special resolution passed by the company (Section 192).

The forms of an annual return to be filed by a company not having a share capital and that to be filed by a company having a share capital differ in certain respects ; the particulars thereof are contained in Sections 159 and 160.

In the case of company not having a share capital, an extraordinary general meeting can be convened on the requisition of members not having less than one-tenth of the total voting power of all the members, who have the right to vote at a general meeting. If on the other hand, the gaurantee company has been formed with a share capital, the requisition must be made by such of the requisitionists as represent either a majority in value of the paid-up share capital held by all of them or not less than 1/10 of the paid-up capital carrying the right to vote at the general meeting [Section 169 (4]

Section 37 prohibits as guarantee company not having a share capital and registered on or after 1 4 1914 from giving any person a right to participate in the divisible profits of the company otherwise than as a member. For the purpose any provision in the articles of memorandum or in any resolution of a company purpor ting to divide the undertaking into shares or interest will be treated as a provision for a share capital notwithstanding that the nominal amount or the number of the shares or interests is not specified thereby.

For the investigation of the affairs of the guarantee company not having a share capital, the application must be made to the Central Government by not less than 1/5th of the total number of members on the register of the company (Section 235 (b)]. In the case of guarantee company having a share capital for the same purpose, the application must be made by not less than 200 members or by members holding not less than 1/10 of the total voting power (Section 235, (a)].

The restrictions on the appointment or advertisement of directors do not apply to a guarantee company not having a share capital (Section 266). Provisions of Sections 171, 176 and 188 also are applicable to such companies.

Powers of the Central Government

Under the Act, extensive and wide powers have been vested in the Central Government in regard to several matters. As such, the success of the joint stock

enterprise largely depends upon how the Central Government performs its administrative functions. These powers may be considered under the following heads :

1. *Power to Alter Schedules :* By notification in the Official Gazette, the Central Government may alter any regulation, rules, tabler forms and other provisions contained in any of the Schedules to the Act except Schedules XI and XII. Any such alterations will come into force from the date of notification and will have the same effect as the Act itself. Any alteration in Table A of Schedule I will not however, apply to any company registered before the date of such alteration [Section 641 (1) and (2)]. Furthermore, every alteration aforesaid must be laid before each House of Parliament (while it is in session) for a total period of 30 days which may be comprised in one session or in two or more successive sessions if, before the expiry of the session in which it is so laid or the session immediately following, both Houses either agree to any modification made in the alteration aforesaid or agree that the alteration should not be made, the alteration shall thereafter have effect only in such modified form or be of no effect, as the case may be. But such modification or annulment shall be without prejudice to the validity of anything previously done in pursuance of that alteration [Section 641 (3) as amended by the Companies (Amendment) Act, 1974)].

2. *Power to Make Rules* : In addition to the powers conferred by Section 641 discussed above the Central Government is empowered to make rules, by notification in the Official Gazette. These are the rules for all or any of the matters which, under this Act, are to be, or may be, prescribed by the Central Government, and generally for carrying out the purpose of the Act. [Section 642 (1)] Any such rule may provide that a contravention thereof, shall be liable to be punished with a fine extending up to Rs. 500 and if the contravention continues, a further penalty up to Rs. 50 per day shall be imposed. As regards the submission of every such rule to Parliament, the same requirements will have to be complied with, as those discussed above under Section 641 (3) [Section 642 (2) and (3)].

3. *Power to Delegate Functions (Section 637)* : By notification in the Official Gazette and subject to such conditions and restrictions and limitations as may be specified in the notifications the Central Government may delegate : (a) any of its powers or functions, under Act (other than the power to make rules and the power to appoint a person as public trustee under Section 153-A to the Company Law Board) ; (b) any of its powers of function under the Act, to such other authority or such officer as may be specified in the notification save and except those mentioned below The Central Government is debarred from delegating the same under the following provisions, viz, Sections 10. 81. 89, (4), 211 (3) and (4), 212. 213,235. 237, 239. 241,242, 243,244,245, 247,248, 249. 260,259 268,269 274 (2), 295, 300, 310, 311, 324 326. 328, 329, 332, 343, 345, 346, 347 (2),. 349, 352, 369, 372, 399, (4) and (5) 401, 408, 409, 410, 411 (b), 448, 609. 613, 620, 638,,641 and 642.

The provisions of the Act shall apply in relation to the Company Law Board

as they apply in relation to the Central Government in respect of any matter in relation to which the powers and functions of the Central Government have been delegated to the Company Law Board.

A copy of the notification shall, as soon as, possible after it has been issued, be Placed before both Houses of Parliament.

4. *Power to Accord Approval, etc.* (*Section 657 A*) : Read the discussion under (3) at p. 7.

5. *Fixation of Remuneration* : Read the discussion under (4) at pages 7 & 8.

6. *Power to Call for Statistics* (*Section 615*) : The Central Government is empowered to require companies generally, or any class of companies, or any company, to furnish such information or statistics, with regard to their or its constitution or working. An order addressed to companies generally, or to any class of companies, shall be published in the Official Gazette or in such other manner as the Government may think fit. But on the other hand, such an order addressed to a particular company, must be served on it as any document is served on a company under Section 51.

In order to be satisfied that the information or statistics furnished by a company is correct and complete the Central Government may require the company either to produce records or documents in its possession or control for inspection before an officer, specified by the Government or to furnish such other information as may be specified by the Government. For these purposes and in the case of company's failure to comply with these requirements, the Government may direct an enquiry to be made by any person or persons who shall have such powers as may be prescribed.

In the case of a body corporate incorporated outside India but having a place of business in India, the powers conferred by Section 615 may be enforced with reference to the business carried on in India.

Application of the Companies Act, 1956 to Companies Formed or Registered Under Previous Companies Acts

(1) The provisions of the Act of 1956 shall apply to all companies whether limited by shares or by guarantee or unlimited—which were *formed and Registered* under any of the previous Indian Companies Act and were in existence on 1st April 1956. But table A of schedule I shall not apply to a company registered under the Acts of 1857, 1860, 1868 and 1882. Date of registration of such companies will be the actual date on which they were incorporated (Section 561).

(2) The Act of 1956 shall apply to every company registered but *not formed* under any previous companies law, e. g. formed under a Deed of settlement but registered under any of the previous Companies Acts. This application shall be in the same manner as the provisions of Part IX *i.e.*, Sections 565 to 581 to be discussed later on, of the 1956 Act have been made applicable to companies registered but not formed under this Act (Section 562). Date of registration of companies will be the actual date on which they were incorporated.

(3) The Act of 1956 shall apply to every *unlimited* company registered as a limited company in pursuance of any previous company Law, in the same manner as it applies to an unlimited company. However the date of registration of such companies will be the actual date on which they were incorporated (Section 563).

(4) Transfer of shares of the companies registered under the Act of 1857 and/or the Act of 1860 will be in accordance with the practice existing in these companies or in the manner as the general meeting may direct [Section 564].

Companies Authorised to Register Under the Act

Companies Capable of Being Registered (Section 565) : Barring certain exceptions, any company consisting of 7 or more members, formed by an Act of the U. K Parliament or according to any law in India may be registered under the Companies Acts 1956 as a company limited by shares, limited by guarantee or as an unlimited company. Such registration may be only for the purpose of its being wound up.

The exceptions mentioned above are : (i) a company registered under Indian Companies Act 1882 or 1913 ; (ii) a limited liability company formed by any Act of India or Act of the UK not being a joint stock company : (iii) a limited liability company formed under any of the previous Acts : (iv) a company that is a joint stock company as defined in Section 566. That is to say, these companies are not registered under this Act.

As regards the procedure, a resolution passed by a majority in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose is a condition precedent to registration. It is not the majority of those voting but the majority of those present. In case the liability of the members is not limited, a resolution has to be passed by 75% of the members present (not 75% of the voting) before the company can be registered. Where a company is about to register itself as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute a specified amount, in case, the company goes into liquidation. In computing the said majority at the meeting, when a poll is demanded, regard must be had to the number of votes to which each member is entitled according to the regulations of the company.

Definition of "joint stock company" (Section 566) : For the purposes of Part IX of the Act, a joint-stock company means a company having—(a) a permanent paid-up or nominal share capital of fixed amount, (b) divided into shares also of fixed amount or held and transferable as stock, or (c) divided and held partly in shares and partly in stocks and (d) the members are the holders of these shares or stocks. When such a company is registered under the companies Act, 1956, then it shall be deemed to be a company limited by shares.

Requirements for Registration of Joint-stock Companies (Section 567) : Prior to the registration of a joint-stock company (under Part IX), the following documents have to be delivered to the Registrar :

(a) a list of names, addresses and occupations of all persons who on a day named in the list (not being more than 6 clear days before the day of

registering) were members of the company. The list also contains the shares or stock held by them respectively, distinguishing in cases where the shares are numbered, each share by its number ;

(b) a copy of any Act of Parliament or other Indian Law, Act of Parliament of the U.K., Royal Charter, Letters Patent, Deed of Settlement, Deed of Partnership or other instrument constituting or regulating the company; and

(c) if the company is intended to be registered as limited company, a statement specifying such particulars as (i) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists, (ii) the number of shares taken and the amount paid on each share, (iii) the name of the company with the addition of the word "Limited" or "Private Limited" as the last word or words; and (iv) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

The application to the Registrar of Companies should be in Form No. 37. The list of numbers should be in Form No. 39. Particulars of capital should be in Form No. 40

Requirements for Registration of Companies not Being Joint-stock Companies (Section 568) : This Section lays down the procedure for registration of companies other than joint-stock companies. Prior to registration, the following documents have to be delivered to the Registrar, namely—(i) a list showing the names, addresses and occupations of the directors, and the manager, if any ; (ii) a copy of any Act of Parliament or other Indian Laws, Act of the U. K., Parliament, Letters Patent, Deed of Settlement, Deed of Partnership or otheri nstrument constituting or regulating the company ; and(iii)in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

The application to the Registrar of Companies should be in Form No. 38 and the particulars of directors and members in Form No. 42

Authentication of Statements of Existing Companies (Section 569) : The documents to be filed with the Registrar of Companies (mentioned above) have got to be verified by the declaration of at least 2 directors or other principal officers of the company.

Power of the Registrar to Require Evidence as to Nature of the Company [Section] : The Registrar has the discretion to call for such evidence as he thinks necessary for the purpose of satisfying himself, whether, any company proposing to be registered is or is not a joint-stock company within the meaning of Section 566.

The Registrar has the discretion to refuse registration of a company, but he must not exercise this discretion arbitrarily. Against refusal by the Registrar an application under Article 226 of the Constitution would lie in the Hight Court.

Change of Name for Purpose of Registration [Section 572] : It is open to the Registrar of Companies to refuse registration of a company if its name is undesirable. In such a situation, the company may, with the approval of the Central Government signified in writing, change its name with effect from the date of its registration (under Part IX). However, for changing the name as aforesaid, a resolution has to be passed at meeting of the members comprising the same. The passage of such resolution must be by a majority as specified in Section 565.

Addition of "Limited" or "Private Limited" to Name : Under Section 573, on registration (under Part IX), every company must have the word "Limited" or "Private Limited", in its name. However, such a company may obtain a licence under Section 25 for the omission of the word "Limited" or Private Limited."

Certificate of Registration of Existing Companies (*Section 574*) : On compliance with the requirement as to registration and on payment of such fees [if any] as are payable under Schedule X, the Registrar shall issue a certificate of incorporation.

According to Section 35, the issue of the said certificate is a conclusive evidence that all the requirements of the Act have been complied with and the company is duly registered.

Vesting of Property on Registration : In terms of Section 575, on registration of a company under this Act, all movable and immovable properties (including actionable claims) of the old company automatically vest in the new company. It has been held that no separate conveyance or deed is necessary in this regard.

Section 576 which is supplementary to Section 575 provides that rights and liabilities in respect of any debt or obligation incurred or contracts entered into by the old company shall automatically stand transferred to and vested in or against the new company without being affected in any way.

Continuation of Pending Legal Proceedings : By virtue of Section 577, any suits or legal proceedings pending on the date of registration against the company or any public officer or member of the company may continue as before even after registration, without amending the pleadings. But in practice, the pleadings are amended to bring the altered situation on record.

A decree obtained in any such proceeding shall not be executed against any individual member ; it may be realised from the company and in default the company may be wound up.

Effect of Regulation under Part IX Section 578 : When a company is registered under this Part, some of the provisions of its constitution shall be treated as conditioned in a registered memorandum : the rest of the provisions would be deemed to be obtained in the registered articles. These provisions may be contained in any Act of Parliament ; in any Indian law or any instrument constituting or regulating this company or in any resolution of such a company. On registration, these conditions which are, in all propriety, to be deemed to be in the memorandum can be altered in the same manner as a condition in the

[illegible] in the articles and alteration of any such provision shall be governed by the provisions for alteration of articles of a company incorporated under this Act.

All the provisions of this Act shall apply to the company, its members, contributories and creditors. But there are certain exceptions to the rule which are as follows:

(i) Table A in Schedule I shall not apply unless and except in so far as it is adopted by special resolution.

(ii) The provisions of the Act relating to numbering of shares shall not apply to any joint-stock company whose shares are not numbered.

(iii) The company shall not have power to alter any provisions contained in any Act of Parliament or other Indian Law relating to the company except to the extent permitted by Section 578.

(iv) Except permitted by this Section, the company shall not have power, without the sanction of the Central Government, to alter U.K., Royal charter or Letters Patent, relating to the company.

(v) The company cannot alter its objects if contained in any Act of Parliament or other Indian Law or in any Act of the U.K., Parliament, Royal Charter or Letter Patent.

(vi) Every person who would have been liable to pay the company's debt and liabilities and to contribute for adjustment of rights among the members shall also be liable to the same extent in the event of the company being wound up. The legal representatives of a deceased contributory will also be liable in respect of the liability of the contributory.

The provisions of this Act with respect to (i) registration of an unlimited company as limited company and on such registration (ii) the power to increase the nominal amount of share capital (iii) the power of a limited company to determine that a portion of its shares capital shall not be capable of being called up except in the event of winding-up will have the effect even though there are restrictions in any other Act or instrument constituting or regulating the company.

Any provision contained in any Act or instrument constituting or regulating the company, if contained in the memorandum could not have been altered by the company, then, on registration, such provision cannot also be altered

It may be noted that the expression "instrument" includes deed of settlement deed of partnership, Act of U.K., parliament, Royal Charter and Letters Patent.

Power to Substitute Memorandum and Articles for Deed of Settlement (Section 579) : A company (registered in pursuance of Part (IX) may by special resolution, alter the form of its constitution a memorandum or articles for a *deed of settlement* (*i.e.*, any Deed of Partnership, Act of the U.K., Parliament, Royal Charter or Letters Patent or other instrument constituting or regulating the company. But the term does not include any Indian Act).

The provisions of Sections 17, 18 & 19 regarding alteration of the objects, shall so far as applicable apply to any alteration under this Section with the following

modifications :

(a) There shall be substituted for the printed copy of the altered memorandum required to be filed with the Registrar a printed copy of the substituted memorandum and articles ; and (b) on the registration of the alteration being certified by the Registrar, the substituted memorandum and articles shall apply to the company in the same manner, as if it were a company registered under this Act with that memorandum and those articles, and company's deed of settlement shall cease to apply to the company.

Power of Court to Stay or Restrain Proceedings (Section 580) : After the presentation of a petition for winding-up but before the order of winding-up is made, the Court may, on an application made under Section 442, stay any suit or legal proceedings already pending and may restrain any person from filing a suit or taking legal proceedings against the company. Under Section 580, the same jurisdiction of the Court may be exercised.

The company, a contributory and a creditor may apply for stay of any suit or legal proceedings against the company. A suit or legal proceeding pending against a contributory, who might have been previously peronally liable for company's debts, can be stayed only on the application of the creditor, Section 586 (discussed in F.S.P. (N) CL-5) makes a similar provision in respect of unregistered companies.

N B. (i) Section 422 applies to companies within the meaning of the Companies Act, 1956

(ii) Section 580 applies to companies not incorporated under this Act but are allowed to be registered under the Act.

(iii) Section 586 can be invoked when an Indian Court is winding-up an "unregistered company" including a foreign company.

Suits Stayed on Winding-up Order (Section 581) : The provisions of this Section are similar to those of Section 446. No person can file or proceed with any suit or legal proceeding against the company or any contributory of the company. This provision applies, when a winding up order has been made or a provisional liquidator has been appointed.

SELF-EXAMINATION QUESTIONS

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper. The answer to these questions are not required to be written out or to be sumitted for evaluation.

1. Shri Premji, the Managing Director of X Ltd, purchased a block of 1,000 shares of M. Ltd. at Rs. 75 per share. Subsequently, the price of shares fell to Rs. 50 per share and the company suffered a loss of Rs. 20,000. The Managing Director charged it to the company, But when the matter came up for confirmation before the Board, the directors refused to confirm the purchase on the ground that the statutory procedure according to which the directors should have been informed of the purchase had not been followed, Could they do so ?

2. The employees of A & Co. Ltd., who are members of the contributory provident fund scheme of the company, gave their consent in writing to the proposal of the company, that the balance standing to their credit in the accounts of the

Fund be utilised for constructing residential quarters for the members of the staff of the company. Could the company acting on their advice proceed to invest the balances in the manner proposed ;

3. The Registrar of Joint Stock Companies instituted a prosecution against A & Co. Ltd, on the following grounds :

(i) that the company did not hold an annual general meeting under Section 166 within the period prescribed by the Section;

(ii) that it had failed to lay before the meeting the statements of the profit and loss account and balance sheet as required by Section 210 : and

(iii) that it had failed to submit its annual return under Section 159.

Could the Court in such proceedings direct the company to file with the Registrar the balance sheet and the profit and loss account and annual return ?

4. The employees of a company under the conditions of their service, had deposited certain amounts as securities against losses that the company may suffer through their default. The company had a strong room of its own, wherein it kept the amounts. Could it do so ?

5. X & Co., had placed a part of the amount standing to the credit of Employees Provident Fund, in the fixed deposit with a bank and had invested the balance in Government Securities On an average, the investment earned an interest at the rate of 5% per annum. A member of the fund, on receiving his pass book, protested that the rate of interest credited to his account was too low and contended that the balance to his credit should have earned interest at least at 5½%. Would his claim succeed ?

6. An employee requested the trustees of the Provident Fund that he be shown the receipts in respect of amounts deposited with different banks. The trustees refused to do so. Could the member compel them to do so.

Answers :

Q. 1...Yes Q. 2....No Q. 3 Yes Q. 4...Yes Q. 5 No Q. 6...Yes.

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STUDY MATERIAL F.S.P. (N) Adv. Cl.—7

FINAL COURSE (N)

Company Law

STUDY—VII

This Study Covers:

Schedules: I, II, III, IV, V & VI to the Companies Act, 1956.

Prescribed Reading: *Lectures on Company Law* (7th Edition) by S.M. Shah

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Generally, the internal management of a company is carried on in accordance with the articles of association. Relationship between members *inter se* and between members and the company is governed by the articles. Memorandum of Association of a company is its charter of activities within the bounds of which it can carry out its business. Both these documents are construed as a notice to persons dealing with the company ; their contents are presumed to be known. If the company enters into a contract, contrary to the terms of the memorandum or the articles, the company is not bound by it. But outsiders may presume that the provisions of the articles have been complied with, *e.g.*, outsiders are not put on an enquiry into the validity of the election of directors—this passes for the doctrine of Indoor Management as enunciated in Royal British Bank *v.* Tarquand Subject to the provisions of the law and the memorandum, the articles of association define the powers of shareholders, directors, managing director *etc.* If the powers exercised by the director are *ultra vires* the articles, these can, nonetheless, be ratified by the shareholders if these are *ultra vires* the memorandum.

A public limited company by shares is not bound to frame articles of association of its own, if it does not so frame. Table A of Schedule I to the Companies Act will apply. Even if the company has articles of its own but these are silent on any point then the relevant provision of Table A will apply.

Table A deals with the regulations for management of a company limited by shares. Table B contains the form of Memorandum of Association of a company limited by shares, Tables C and D the forms of Memorandum and the articles of association of a company limited by guarantee and having or not having a share capital Table E prescribes the form of memorandum and the articles of association of an unlimited company. Table F contains the form of statement to be published by limited banking companies, insurance companies and deposit, provident of benefit societies.

Some of the important *accounting provisions* of Table A are summarised below :

Share Capital and Variation of Rights

(1) Subject to the provisions of Section 80 of the Act, the company may issue preference shares with the sanction of an ordinary resolution, to be redeemed, on such terms as the company may determine by special resolution before the issue of the shares.

(2) The rights attached to any class of shares may be varied (unless otherwise provided by the terms of issue of the shares of that class) with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of that class. This is subject to the provisions of Sections 106 and 107 of the Act.

(3) The rights conferred upon holders of the shares of any class issued with preferred or other rights, shall not unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking pari passu therewith.

(4) The company may exercise the powers of paying commission for subscribing or procuring subscription of shares as conferred by Section 76 of the Act provided that :

(a) The rate per cent or the amount of the commission paid is disclosed according to Section 76.

(b) The rate of commission shall not exceed the rate of 5 per cent of the issue price.

(c) The commission may be satisfied by payment of cash, or allotment of fully or partly paid shares or partly in one way and partly in the other way.

(d) The company may also, on any issue of shares, pay such brokerage as may be lawful.

(5) The company does not recognise trust except as required by law, nor does it recognise any equitable, contingent, future or partial interest in any share except an absolute right to the entirety in the registered shareholder.

(6) (i) The company shall have a first and paramount lien—

(a) on any share (not being a fully paid share), for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share (not being fully paid share) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company.

Provided that the Board of Directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause.

(ii) The company's lien, if any, on a share extends to all dividends payable thereon.

(7) The company may sell, in such manner as the Board thinks fit, any shares on which the company has a lien :

Provided that no sale shall be made (a) unless a sum in respect of which the lien exists is presently payable ; or (b) until the expiry of fourteen days after a notice in writing (stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable) has been given to the registered shareholder or his legal representative.

(8) The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable.

The residue, if any, shall, subject to like lien for sums not presently payable as existed upon the share before the sale, be paid to the person entitled to the shares at the date of the sale.

Calls on Share

(9) The Board may, from time to time, call upon the members in respect of any moneys unpaid on their shares (whether on account of the nominal value of the shares or by way of premium) and not by the conditions of allotment thereof made payable at fixed times.

No call shall exceed one-fourth of the nominal value of the share or be payable at less than one month from the date fixed for the payment of the last preceding call. At least 14 days' notice must be given to the members for payment of the call. The notice must specify the time or times and place of payment. A call may be revoked or postponed at the discretion of the Board.

(10) If a sum called in respect of a share is not paid on or before the due date, the persons concerned shall pay interest thereon from the due date to the time of actual payment at 5 per cent per annum. The Board shall be at liberty to waive interest or charge it at a lower rate.

(11) The Board :—

(a) may, if it thinks fit, receive from any member willing to advance the same, all or any part of the moneys uncalled and unpaid upon any shares held by him ; and

(b) upon all or any of the moneys so advanced, may (until the same would, but for such advance, become presently payable) pay interest at such rate not exceeding, unless the company in general meeting shall otherwise direct, six per cent per annum as may be agreed upon between the Board and the member paying the sum in advance.

Transfer of Shares and Transmission of Shares

(12) The instrument of transfer of any share in the company shall be executed by or on behalf of both the transferor and transferee. The transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

(13) The Board may, subject to the right of appeal conferred by Section 111 of the Act, declined to register :—

(a) the transfer of a share, not being a fully paid share, to a person of whom they do not approve ; or

(b) any transfer of shares on which the company has a lien.

(14) The registration of transfers may be suspended at such times and for such periods (not exceeding forty-five days in any year) as the Board may from time to time determine.

(15) On the death of a member, the survivor or survivors where the member was a joint holder, and his legal representatives where he was sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares. The estate of a deceased joint holder will not be released from any liability in respect of any share which had been jointly held by him with other persons.

*N.B. Form No. 7B is the Share Transfer Form.

Forfeiture of Shares

(16) If a member fails to pay any call, or instalment of a call, on the day appointed for payment thereof, the Board may, at any time thereafter during such time as any part of the call for instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

(17) The notice aforesaid shall :—

(a) name a further day (not being earlier than the expiry of fourteen days from the date of the service of the notice) on or before which the payment required by the notice is to be made ; and

(b) state that, in the event of non-payment on or before the day so named, the shares in respect of which the call was made will be liable to be forfeited.

(18) If the requirements of any such notice as aforesaid are not complied with any share in respect of which the notice has been given, may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Board to the effect.

(19) (a) A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Board thinks fit.

(b) At any time before a sale or disposal as aforesaid, the Board may cancel the forfeiture on such terms as it thinks fit.

(20) (a) A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall remain liable to pay to the company all money which, at the date of forfeiture, were presently payable by him to the company in respect of the shares.

(b) The liability of such person shall cease if and when the company shall have received payment in full or all such moneys in respect of the shares.

Conversion of Shares into Stock

(21) The company may, by ordinary resolution—

(a) convert any paid up shares into stock ; and

(b) reconvert any stock into paid-up shares of any denomination.

(22) The holders of stock shall, according to the amount of stock held by them, have the same rights, privileges and advantages, as regards dividends, voting at meetings of the company, as if they hold the shares from which the stock arose.

Share Warrants

(23) The company may issue share warrants subject to and in accordance with the provisions of Sections 114 and 115 ; and accordingly, the Board may act in its discretion, with respect to any share which is fully paid upon application in writing signed by the person registered as holder of the share.

(24) The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company and of attending and voting and exercising the other privileges of a member at any meeting held after the expiry of two clear days from the time of deposit as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant.

Not more than one person shall be recognised as depositor of the share warrant.

The company shall, on two days' written notice, return the deposited share warrant to the depositor.

(25) No person shall, except as provided, as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company. But he will be entitled in all other respects to the same privileges and advantages as if he was named in the register of members as the holder of the shares included in the warrant and he shall be a member of the company.

Alteration of Capital

(26) The company may, by ordinary resolution, increase the share capital by such sum to be divided into shares of such amount, as may be specified in the resolution.

(27) The company may, by ordinary resolution—

(a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;

(b) sub-divide its existing shares or any of them into shares of smaller amount than is fixed by the memorandum, subject, nevertheless to the provisions of clause (d) of Section 94 (1) ;

(c) cancel any shares which at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

(28) The company may, by special resolution, reduce in any manner and with, and subject to any incident authorised and consent required by law :—

(a) its share capital ;

(b) any capital redemption reserve accounts ; or

(c) any share premium account.

Dividends and Reserves

(29) The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the Board.

(30) The Board may from time to time pay to the members such interim dividends as appear to it to be justified by the profits of the company.

(31) The Board may, before recommending any dividend, set aside out of the profits of the company such sums as it thinks proper as reserve or reserves which shall, at the discretion of the Board, be applicable for any purpose to which the profit of the company may be properly applied, including provision for meeting contingencies or for equalising dividends ; and pending such application may at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the Board may, from time to time, think fit.

The Board may also carry forward any profits which it may think prudent not to divide without setting them aside as a reserve.

(32) Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared paid and according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid accordingly to the amount of the shares.

No amount paid or credited as paid on a share in advance of calls shall be

treated for the purpose on this regulation as paid on the share.

All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid, but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, such share shall rank for dividend accordingly.

(33) The Board may deduct from any dividend payable to any member all sums of money, if any presently payable by him to company on account of calls or otherwise in relation to the share of the company.

(34) Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus, wholly or partly by the distribution of specific assets ; and the Board shall give effect to the resolution of the meeting.

(35) No dividend shall bear interest against the company.

Accounts

(36) The Board shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations, the accounts and books of the company, or any of them, shall be open to the inspection of members not being directors.

Capitalisation of Profits

(37) (1) The company may in general meeting, upon the recommendation of the Board resolve :—

(a) that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the company's reserve accounts, or to the credit of the Profit and Loss Account, or otherwise available for distribution ; and

(b) that such sums be accordingly set free for distribution in the manner specified in clause (2) amongst the members who would have been entitled thereto, if distributed by way of dividend and in the same proportions.

(2) The sum aforesaid shall not be paid in cash, but shall be applied, subject to the provisions contained in clause (3), either in or towards :—

(i) paying up any amount for the time being unpaid on any shares held by such members respectively.

(ii) paying up in full, unissued shares or debentures of the company to be allotted and distributed, credited as fully paid up, to and amongst such members in the proportions aforesaid ; or

(iii) partly in the way specified in sub-clause (i) and partly in that specified in sub-clause (ii).

(3) A share premium account and a capital redemption reserve account may, for the purpose of this regulation, only be applied in the paying up of unissued shares to be issued to members of the company as fully paid bonus shares.

(4) The board shall give effect to the resolution passed by the company in pursuance of this regulation.

The provisions of Table A in respect of *general meeting and proceedings thereat votes of members. Board of Directors proceedings, of Board manager or secretary the seal and winding-up are outlined below* :

General Meeting and Proceedings Thereat

(1) All general meetings *other than* annual general meetings shall be called extraordinary general meetings.

(2) Whenever the Board thinks fit, it may call an extraordinary general meeting.

(3) At any general meeting, a quorum must be present when the meeting proceeds to business ; otherwise no business can be transacted. In the case of a public company, 5 members present in person and in the case of a private company 2 members present in person shall constitute a quorum.

(4) If there is any Chairman of the Board, he shall preside over each general meeting of the company. If there is no such Chairman, or if he is not present within 15 minutes of the scheduled time, or is unwilling to act as Chairman of the meeting, then the directors present shall elect one of them to take the chair. If no director is willing to act as chairman or if no director is present within 15 minutes of the appointed time of the meeting, the members present shall choose one from amongst them to take the chair.

(5) The chairman may, with the consent of any meeting at which quorum is present, and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place. Only the unfinished business of the original meeting can be transacted at its adjourned meeting.

(6) In case of adjournment of the meeting for 30 days or more, notice of the adjourned meeting has to be given as in the case of an original meeting ; otherwise no notice of the adjourned meeting would be necessary.

(7) The Chairman shall have a second or casting vote in case of a 'tie', whether on a show of hands or on a demand of poll.

(8) Any business other than that upon which a poll has been demanded may be proceeded with pending the taking of the poll.

Votes of Members

(1) Subject to the right or restrictions for the time being attached to any class or classes of shares : (a) on a show of hands, every member present in person have one vote ; (b) on a poll, the voting rights of members shall be as laid down in Section 87.

(2) Where there are joint holders the vote of the senior who tenders a vote—whether in person or by proxy—shall be accepted to the exclusion of the vote of the other joint-holder or holders. Seniority in this regard has to be determined by the order in which the names stand in the Register of Members.

(3) Unsoundness of mind or certified lunacy of a member is no bar to his voting. He may vote—whether on a show of hands or on a poll—by his committee or other legal guardian. Any such committee or guardian may, on a poll, vote by proxy.

(4) If all calls or other sums presently payable by a member in respect of shares have been paid, then only he can vote in any general meeting. Objection as to the qualification of any voter can be raised only at the meeting or adjourned meeting at which the vote objected to is given or tendered. Every vote not disallowed at such meeting shall be valid for all purposes. Any such objection made in due time shall be referred to the Chairman of the meeting, whose decision is final and conclusive.

(5) The instrument appointing a proxy has to be lodged at the registered office of the company not less than 48 hours before the time for holding the meeting, or in the case of the poll, not less than 24 hours before the time appointed for taking of the poll; and in default, the instrument of proxy shall not be treated as valid. The instrument must be in either of the forms in Schedule IX of the Act or a form as near thereto as circumstances admit.

(6) A vote cast as per the instrument of proxy shall be valid, notwithstanding the previous death or insanity of the principal or the revocation of the proxy or the transfer of the shares in respect of which the proxy is given, if the notice of such death, insanity, revocation or transfer has not been received by the company at its office before the commencement of the meeting or the adjourned meeting.

Boards of Directors and its Proceedings

(1) The numbers of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them.

(2) Directors' remuneration shall insofar as it consists of a monthly payment, be deemed to accrue from day-to-day. Apart from their remuneration admissible by the Act, they may be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from the Board or Committee or general meetings or in connection with the company's business.

(3) The qualification of a director shall be the holding of at least one share in the company.

(4) The Board may pay all expenses incurred in setting up and registering the company.

(5) The company may exercise : (a) the power conferred on it by Section 50 with regard to having an official seal for use abroad, and such power shall be vested in the Board ; (b) the power conferred by sections 157 and 158 relating to the keeping of a foreign register ; and the Board may (subject to the provisions of those Sections) make and vary such regulations as it may think fit regarding the keeping of any such register.

(6) Every director present at any meeting of the Board or of a committee thereof shall sign his name in a book to be kept for that purpose.

(7) The Board shall have power at any time, and from time to time, to appoint an additional director, provided that the number of directors including the additional directors shall not at any time exceed the maximum strength fixed for the Board by articles. Such additional director shall hold office up to the date of the next annual general meeting but shall be eligible for appointment by the company as a director at that meeting subject to the provisions of the Act.

(8) The Board may meet for the despatch of business, adjourn and otherwise regulate its meetings, as it thinks fit.

(9) A director may, and the manager or secretary shall, on the requisition of a director at any time summon a Board's meeting. Save as otherwise expressly provided in the Act, questions arising at any of its meeting shall be decided by the majority of votes. The chairman of the Board, if there be any, has a second or casting vote in the case of an equality of votes.

(10) In spite of any vacancy in the Board, the continuing directors may act. But if and so long as their number is reduced below the quorum fixed by the Act for a Board meeting, the continuing directors or director may act only for two purposes and no other, *viz.* (a) to raise the number of directors to the level of the quorum fixed, or (b) to summon a general meeting of the company.

(11) The Board may elect a chairman of meeting and determine the tenure of his office. In the absence of any such election or in the case of an elected chairman's failure to be present within 5 minutes after the time fixed for the meeting, the directors present may choose one from amongst them to hold the chair.

(12) Subject to the provisions of the Act, the Board can delegate any of its powers to committees consisting of such member or members of its body as it thinks fit. While exercising such delegated power(s), such a committee has to conform to any regulations that may be imposed on it by the Board. The committee can do all that mentioned in the preceding paragraph (11). It may meet and adjourn as it thinks proper. Majority rule prevails over questions arising at its meeting, and its chairman's second or casting vote is the decisive factor in the case of an equality of votes.

(13) Acts done by any meeting of the Board or its committee or by any person acting as a director are not violated by a subsequent discovery of some defect in their appointment or of their disqualification.

(14) Save and otherwise expressly provided in the Act, a written resolution signed by all the members of the Board of its committee, who are for the time being entitled to receive notice of a meeting, will be valid and effectual, though it has *not in fact* been passed at a formal meeting.]

Manager or Secretary

Subject to the provisions of the Act, the Board may appoint a manager or

secretary for such term, at such remuneration and upon such conditions as it may think fit and may remove him as well. A director may be appointed as manager or secretary.

The Seal

The Board has to provide for the safe custody of the seal. It shall be affixed to an instrument only by the authority of the Board or of its committee authorised in this behalf by the former; also this affixation has to be made in the presence of at least 2 directors and of the secretary or such other person as the Board may appoint for the purpose, and these persons must sign every instrument to which the seal is so affixed in their presence.

Winding-up

(1) If the company is to be wound up, the liquidator may, with the sanction of a special resolution of the company and other sanction required by the Act, divide among the members, in specie of kind, the whole or any part of company's assets, whether or not they will consist of property of the same kind. For this purpose the liquidator may set such value as he deems fair upon any property to be divided as aforesaid : he may determine how such division shall be carried out as between the members or different class of members.

(2) The liquidator may, with the like sanction referred to in (1) above, vest the whole or any part of such assets in trustees upon such trusts for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no member shall be compelled to accept any shares or other securities whereon there is any liability.

(3) Every officer or agent for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgement is given in his favour or in which he is acquitted or in connection with any application under Section 633 in which relief is granted to him by Court.

TABLE C

It contains the articles of association of a company *limited by guarantee and not having* a share capital. These are discussed below.

Members

The number of members with which the company proposes to be registered is 530.; but the Board of Directors may, from time to time, whenever the company or the business of the company requires, register an increase of members. The subscribers to the memorandum and such other persons as the Board shall admit to membership shall be members of the company.

General Meeting and Proceeding Thereat

(1) All general meetings excepting annual general meetings are called extraordinary general meetings. The Board can call an extraordinary general meeting whenever it thinks fit.

(2) If at any time there are not within India Directors capable of acting, who are sufficient in number to form a quorum, then any director or any two members of the company may call an extraordinary general meeting in the same manner as

nearly as possible, as that in which such a meeting can be called by the Board.

(3) But for a quorum being present at the time when the meeting proceeds to business, a business cannot be transacted thereat. Save as otherwise provided, 5 members present in person constitute a quorum.

(4) If within half an hour from the scheduled time the quorum is not present, the meeting, if called on the requisition of members shall stand dissolved in any other case, the meeting shall stand adjourned to the same day in the next week; at the same time and place, or to such day and at such other time and place as the Board determines. If at the adjourned meeting a quorum is not present with half an hour from the appointed time, then the members present shall be a quorum.

(5) The Chairman, if any, of the Board shall preside as Chairman at every general meeting of the company. If none or if he is not present within 15 minutes after the scheduled time of the meeting or is unwilling to act as such the members present shall choose one as the Chairman from among themselves. The Chairman may, with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting, adjourn the meeting from time to time and from place to place.

(6) Only the unfinished business at the original meeting can be transacted at the adjourned meeting. When the meeting is adjourned for 30 days or more notice of the adjourned meeting shall be given as in the case of the original meeting: except as aforesaid, no such notice is necessary.

(7) The Chairman's second or casting vote shall decide the issue in case of an equality of votes.

(8) Any business other than that upon which a poll has been demanded may be proceeded with, pending the taking of the poll.

Votes of Members

(1) Every member has one vote. A member of unsound mind or certified as lunatic may vote, whether on a show of hands or on a poll, by his committee or other legal guardian. Any such committee or guardian may, on a poll, vote by proxy.

(2) For entitlement to voting at any general meeting, a member must have paid all sums presently payable by him to the company.

(3) No objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected to is given or tendered; every vote not disallowed at such meeting shall be valid for all purposes. Any such objection made in due time has to be referred to the Chairman of the meeting whose decision is final and conclusive.

(4) A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the principal or the revocation of the proxy or the authority under which the proxy was executed. But if the written intimation of such death, insanity, revocation or transfer has been received by the company at its registered office before the commencement of the meeting or adjourned meeting at which the proxy is used, such vote shall not be valid.

Board of Directors

The number of directors and the names of the first directors shall be determined in writing by the subscribers to the memorandum or a majority of them. Their remuneration shall, insofar as consists of a monthly payment, be deemed to accrue from day to day. They may also be paid all travelling, hotel and other expense properly incurred by them in attending and returning from meetings of the Board or any committee thereof or general meeting of the Company, or in connection with the business of the company.

Proceedings of Meetings of Boards

(1) The Boards may meet for the despatch of business, adjourn and otherwise regulate its meetings. A committee of the Boards may also meet and adjourn as it thinks proper.

(2) A director may, and manager or secretary on the requisition of a director shall, at any time summon a meeting of the Board.

(2) Save as otherwise expressly provided in the Act, questions arising at any Board meeting shall be decided by a majority of votes. In case of an equality of votes, the Chairman's second or casting vote shall be the decisive factor. These are similarly applicable to committee meetings.

(4) Any vacancy in the Board notwithstanding, the continuing directors may act. But if and so long as their number is reduced below the quorum fixed by the Act for a Board meeting the continuing directors or director may act only for two-purposes and other *viz.*, (a) to raise the number of the level of directors to the quorum fixed, or (b) to summon a general meeting of the company.

(5) The Board may elect a chairman of its meeting and determine the period for which he is to hold office. If no such chairman is elected, or if at any meeting, the chairman is not present within 5 minutes after the scheduled time of the meeting, the directors present may choose one as the chairman from amongst them. A committee of the Board also has the same powers in this regard.

(6) Subject to the provisions of the Act, the Board may delegate any of its powers to committee consisting of such member or members of its body as it thinks fit. Any committee, thus formed, shall, in exercise of the powers so delegated conform to any regulations that may be imposed on it by the Board.

(7) All acts done by any meeting of the Board or a committee thereof, or by any person acting as a director, shall, despite the fact that it may afterwards be discovered that there was some defect in the appointment of any one or more of such directors or of any person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such director or such person had been duly appointed and was qualified, to be a director.

(8) Save as otherwise expressly provided in the Act, a written resolution signed by all the members of the Board or its committee for the time being entitled to receive notice of a meeting of the Board or its committee, shall be as valid and effectual as if it had been passed at a meeting duly convened and held.

Manager or Secretary

In this case as well, the same rules as mentioned under the same caption under Table A will apply.

The Seal

The Board of Directors has to provide for the seal. It shall not be affixed to any instrument except by the authority of a resolution of the Board and except in the presence of at least 2 directors and of the secretary or such other persons as the Board may appoint for the purpose; and these entities shall sign every instrument to which the seal is so affixed in their presence.

TABLE D OF SCHEDULE I

As has already been stated earlier, this Table contains the proforma memorandum of a company limited by guarantee and having a share capital. The articles of such a company are as follows :

(1) The number of members with which the company proposes to be registered is 100. However, the directors may from time to time register an increase of members.

(2) All the articles of Table A, discussed earlier, shall be deemed to be incorporated with these articles and apply to the company.

TABLE E OF SCHEDULE I

It contains the form of memorandum and the articles of association of an "unlimited company".

Articles

(1) The number of members with which the company proposes to be registered is 20. However, the Board may from time to time register an increase of members.

(2) The share capital of such a company is Rs. 20,000 divided into 20 shares of Rs. 1,000 each. By a special resolution, such a company may do the following namely—(a) increase the share capital by such sum to be divided into shares of such amount as the resolution may prescribe ; (b) consolidate its shares of a larger amount than its existing shares; (c) sub-divide its shares into shares of smaller amount than its existing shares; (d) cancel any shares which at the date of the passing of the resolution have not been taken or agreed to be taken by any person; (e) reduce its share capital in any way.

(3) All Articles of Table A in Schedule I to the Act, except Articles 36, 37, 38 and 39 (relating to conversion of shares into stock) and 44, 45 and 46 (relating to alteration of capital) shall be deemed to be incorporated with these articles and to apply to the company.

TABLE F OF SCHEDULE I

In contains only the form of statement to be published [by limited Banking Companies, Insurance Companies and deposit, Provident of Benefit Societies. The form is given below :

The share capital of the company is Rs.....divided into..... .....shares of Rs.....each.

The number of shares issued is.....Calls to the amount of Rs..... per share have been made, under which the sum of Rs.....has been received.

The liabilities of the company on the 31st day of December (or 30th day of June) were :

Debts owing to sundry person by the company ;

Under decree Rs.

On mortgages or bonds Rs.

On notes, bills or hundies Rs.

On other contracts Rs.

On estimated liabilities Rs.

The assets of the company on that date were :

Government securities (stating them) Rs.

Bills of exchange, hundies and promissory notes. Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

SCHEDULED 1-A TO THE ACT

It gives the list of relatives as envisaged by Section 6 (c). These relatives are father, mother (including step mother) son (including step-son), sons, daughter, (including step-daughter), father's father, father's mother, mother's mother, mother's father, son's son, son's son's wife, son's daughter, son's daughter's husband, daughter's husband, daughter's son, daughter's son's wife, daughter's daughter, daughter's daughter's husband, brother (including step-brother), brother's wife, sister (including step-sister), sister's husband.

SCHEDULE II TO THE ACT

The important provisions of part I and II of Schedule II relating to matters to be specified in Prospectus and Reports to be set out therein have been briefly discussed in I.S.P. (N) CL-2. The students are advised to refer to that study paper and note the provision of Part III of the said Schedule summarised as under. Parts I and II mentioned above have effect subject to the provisions of Part III which are as under :

(1) Clause I (so far as it relates to particulars of the signatories of the memorandum and the shares subscribed for by them-vide Item No. 1 (a) of the aforesaid (Study Paper) and clause 14 (so far as it relates to preliminary expenses *vide* Item No. 13 of the above mentioned Study Paper) of this Schedule shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.

(2) For the purpose of this schedule every person shall be deemed to be a vendor who has entererd into any absolute or conditional contract for the sale or purchase, or for any option of purchase, of any property to be acquired by the company in any case where : (a) the purchase money is not fully paid at the date of the issue of the prospectus ; (b) the purchase-money is to be paid or satisfied (wholly or partly) out of the proceeds of the issue offered for subscription by the prospectus ; (c) the contract depends for its validity of fulfilment on the result of that issue.

(3) Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression "vendor" included the lessor, the expression "purchase-money" included the consideration for the lease and the expression "sub-purchase" included a sub-lease.

(4) If in the case of a company which has been carrying on business, or of a business which has been carried on for less than 5 financial years, the accounts of the company or business have only been made up in respect of 4 such years, 3 such years, 2 such years or one such year, Part II of the Schedule shall have effect as if reference to 4 financial years, 3 financial years, 2 financial years or one financial year (as the case may be) were substituted for references to 5 financial years.

(5) Where five financial years immediately preceding the issue of the prospectus which are referred to in Part II of this schedule or in this part cover a period of less than five years references to the said 5 financial years in either part shall have effect as if references to a number of financial years the aggregate period covered by which is not less than 5 years immediately preceding the issue of the prospectus were substituted for references to the 5 financial years aforesaid.

(6) Any report required by Part II of this Schedule shall either: (a) indicate by way of note any adjustment as regards the figures of any profits or loss or assets and liabilities dealt with by the report which appears to the persons making the report necessary; or (b) make those adjustments and indicate that adjustments have been made.

(7) Any report by accountants required by Part II of these Schedules: (a) shall be made by accountants qualified under this Act for appointment as auditors of a company; and (b) shall not be made by any accountant who is an officer or servant or a partner or in the employment of an officer or servant, of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company. The expression "officer" shall include a proposed director but not an auditor.

SCHEDULE III

(Section 70)

A statement in lieu of prospectus is a statement in the form prescribed by Schedule III which is filed with the Registrar of Companies under Section 70 at least 3 days before the first allotment, when no prospectus is issued or when it is issued but the company has not proceeded to allot any of the shares offered to the public for subscription *e.g.* 'because the minimum subscription did not reach.'

Part I of the Schedule gives the form of Statement and particulars to be contained therein. It is appended below:

FORM OF STATEMENT AND PARTICULARS TO BE CONTAINED THEREIN

THE COMPANIES ACT, 1956

Statement in lieu of Prospectus delivered for registration by [insert the name of the Company.]

Pursuant to Section 70 of the Companies Act, 1956

Delivered for registration by the nominal share capital of the company.....
..... Rs.

Divided into..... Shares of Rs. each

Amount (if any) of above capital which consists of redeemable preference shares	Shares of Rs. each
The earliest date on which the company has power to redeem these shares.	
Names, address, descriptions and occupations of—	
(a) directors or proposed directors.	
(b) managing director or proposed managing director.	
(c) manager or proposed manager.	
Any provision in the articles of the company, or any contract irrespective of the time when it was entered into, as to the appointment of and remuneration payable to the persons referred to in (a), (b) and (c) above.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. Shares of Rs.....fully paid 2. Share upon which Rs....per share credited as paid. 3. Debentures Rs.
The consideration for the intended issue of those shares and debentures.	4. Consideration
Number, description and amount of any shares or debentures which any person has or is entitled to be given an option to subscribe for, or to acquire from a person to whom they have been allotted with a view to his offering them for sale.	1. Shares of Rs.....and Debentures of Rs.
Period during which the option is exercisable.	2. Until
Price to be paid for shares or debentures subscribed for or acquired under the option.	3.
Consideration for the option or the right of option.	4. Consideration

Persons to whom the option or the right to option was given or, if given to existing shareholders or debenture holders as such, the relevant shares or debentures ;	5. Names and addresses :
Names, occupations and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company except where the contract for its purchase or acquisition was entered into in the ordinary course of the business intended to be carried on by the company or the amount of the purchase money is not material.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash, shares, debentures) for each such property, specifying amount (if any) paid or payable for goodwill,	Total purchase price Rs..... Cash ... ... Rs..... Shares ... ... Rs..... Debentures ... Rs..... Goodwill ... Rs.....
Short particulars of every transaction relating to each such property which was completed within the two preceding years and in which any vendor to the company or any person who is, or was at the time thereof, a promoter, director or proposed director of the company, had any interest, direct or indirect.	
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company ; or	Amount paid " payable
Rate of the Commission.	Rate per cent
The number of shares, if any, which persons have agreed to subscribe for a commission.	
If it is proposed to acquire any business, the amount as certified by the persons by whom the accounts of the	

business have been audited, of the net profits of the business in respect of each of the five years immediately preceding the date of this statement, provided that in the case of a business which has been carried on for less than five years and the accounts of which have only been made up in respect of four years, three years, two years or one year, the above requirements shall have effect as if references to four years, three years, two years or one year; as the case may be, were substituted for references to five years, and in any such case the statement shall say how long the business to be required has been carried on.

Where the financial year with respect to which the accounts of the business have been made up is greater or less than a year references to five years, four years, three years, two years and one year in this paragraph shall have effect as if references to such number of financial years as in the aggregate, cover a period of not less than five years, four years, three years, two years or one year, as the case may be, were substituted for references to three years, two years and one year respectively.

Estimated amount of preliminary expenses.	Rs.
By whom those expenses have been paid or are payable,	
Amount paid or intended to be paid to any promoter.	Name of promoter : Amount Rs.
Consideration for the payment.	Consideration :
Any other benefit given or intended to be given to any promoter.	Name of promoter : Nature and value of benefit :
Consideration for the benefit.	Consideration :
Date of, parties to, and general nature of—	
(a) contract appointing or fixing the	

remuneration of directors, managing director, or manager; and

(b) every other material contract [other than (i)] contracts entered into in the ordinary course of the business intended to be carried on by the company or (ii) entered into more than two years before the delivery of this statement.

Time and place at which (1) the contracts or copies thereof or 2 (i) in the case of a contract not reduced into writing, a memorandum giving full particulars thereof and (iii) in the case of a contract wholly partly in a language other than English, a copy of a translation thereof in English or embodying a translation in English of the parts in the other language, as the case may be, being a translation certified in the prescribed manner to be a correct translation may be inspected.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director, managing director, or manager in the promotion of or in the property proposed to be acquired by the company, or where the interest of such director consists in being a partner in a firm, the nature and extent of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

Signatures of the persons above-named as directors or proposed to be

directors, or of their agents authorised in writing) .....

Date.....

In cases mentioned in Part II of this Schedule the statement in lieu of prospectus must set out the reports specified therein. These cases are mentioned below :

(1) Where it is proposed to acquire a business, a report made by accountants (who shall be named in the Statement) upon : (a) the profits or losses of the business in respect of each of 5 financial years immediately preceding the delivery of the Statement to the Registrar; and (b) the assets and liability of the business as at the last date to which the accounts of the business were made up.

(2) (a) Where it is proposed to acquire shares in a body corporate which by reason of the acquisition or anything to be done in consequence thereof or in connection therewith, will become subsidiary of the company, a report made by the accountants (who shall be named in the Statement). This report must relate to profits and losses and assets and liabilities of the *other body corporate* (in accordance with (b) or (c) below, as the case may require). The report should also indicate how the profits or losses of the other body corporate dealt with by the report would have concerned the company : and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares if the company had at all material times held the share to be acquired.

(b) *If the Other Body Corporate has on Subsidiaries*, the aforesaid report shall, so far as regard profits and losses, deal with profits or losses of body corporate in respect of each of the 5 financial years immediately preceding the delivery of the statement to the Registrar : and (ii) so far as regard assets and liabilities, deal with the assets and liabilities of the body corporate as at the last date to which the accounts of the body corporate were made up.

(c) *If the Body Corporate has Subsidiaries*, then the above-mentioned report shall, so far as regards profit or losses, *deal separately with other body corporate's profits or losses* as provided in para (b) above. And in addition the report shall either (i) deal as a whole with the combined profits or losses of its subsidiaries so far as they concern members of the other body corporate, or (ii) deal individually with the profits or losses of each subsidiary, so far as they concern members of the other body corporate ; *or instead of dealing separately with the other body corporate's profits or losses the report* shall deal as a whole with the profits or losses of the other body corporate and, so far as they concern members of the other body corporate, with the combined profits or losses of its subsidiaries. Likewise, as regards assets and liabilities, the report shall deal separately with the other body corporate's assets, and liabilities as provided in para (b) above; in addition, report shall either (i) deal as a whole with the combined assets and liabilities of to subsidiaries, with or without the other body corporate's assets and liabilities or (ii) deal individually with the assets and liabilities of each subsidiary, and shall indicate, as regards the assets and liabilities of the subsidiary, the allowance to be made for persons other than members of the company.

Part III of Schedule III deals with provisions applying to Part I and II of this Schedule. They are as follows :

(1) The expression "vendor" includes a vendor as defined in Part III of Schedule II (vide item No. 2 of the said Part).

(2) Clause 31 of Schedule II (the provisions whereof have been discussed in this Study Paper under paragraph (5) under Part III of Schedule II) shall apply to the interpretation of Part II of Schedule III as it applies to the interpretation of Part II of Schedule II).

(3) If in the case of business which has been carried on (or if in the case of a body corporate which has been carrying on business) for less than 5 financial years, the accounts of the business (or body corporate) have only been made up in respect of 4 such years, 3 such years, 2 such years or one such year, then Part II of this Schedule shall have effect as if references to 4 years, 3 years etc. were substituted for reference to 5 financial years.

(4) Any report required by Part II of this Schedule shall either—(a) indicate, by way of note, any adjustments as regards the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the person making the report necessary or (b) make those adjustments and indicate that adjustments have been made.

(5) Any report by accountants required by Part II of this Schedule—(a) shall be made by accountant qualified under this Act for appointment as auditor of a company; and (b) shall not be made by any accountant who is an officer or servant of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company. It may be noted that the term "officer" shall include proposed director but not an auditor.

SCHEDULE IV

[See Section 44 (2) (b)]

This Schedule deals with the form of Statement in lieu of prospectus to be delivered to the Registrar of Companies by a private company on becoming a public company and report to be set out therein.

FORM OF STATEMENT AND PARTICULARS TO BE CONTAINED THEREIN

THE COMPANIES ACT, 1956

Statement in lieu of Prospectus delivered for registration by
[Insert the name of the Company]

Pursuant to clause (b) of sub-section (2) of Section 44 of the Companies Act, 1956.

Delivered for registration by—

The nominal share capital of the company ... ... Rs.

Divided into ... ... Shares of Rs. each

"Amount (if any) of above capital which consists of redeemable preference shares".	Shares of Rs. each.
"The earliest date on which the company has power to redeem these shares".	
"Names, addresses, descriptions and occupations of (a) director or proposed directors ; (b) managing director or proposed managing director ; (c) manager or proposed manager.	
"Any provision in the articles of the company, or in any contract irrespective of the time when it was entered into, as to the appointment of and remuneration payable to the persons referred to in (a), (b), (c), above"	
"Amount of shares issued"	Shares
"Amount of commission paid or payable in connection therewith."	
"Amount of discount, if any, allowed on the issue of any shares, or so much thereof as has not been written off at the date of the statement."	
Unless more than two years have elapsed since the date on which the company was entitled to commence business :—	
"Amount of preliminary expenses.	Rs.....
By whom those expenses have been paid or are payable.	
"Amount paid or intended to be paid to any promoter."	Name of promoter Amount Rs.....
"Consideration for the payment."	Consideration.
"Any other benefit given or intended to be given to any promoter."	Name of promoter ;
"Consideration for the benefit."	Nature and value of benefit :
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by and the rights in respect of capital and dividends attached to the several classes of shares respectively.	Consideration :

"Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement."	1. Shares of Rs.....fully paid 2. Shares upon which Rs..... per share credited as paid. 3. Debentures of Rs.....each.
"Consideration for the issue of those shares or debentures."	4. Consideration :
"Number, description and amount of any shares or debentures which any person has or is entitled to be given an option to subscribe for, or to acquire from, a person to whom they have been allotted with a view to his offering them for sale."	1. Shares of Rs.....and Debentures of Rs.....
"Period during which the option is exercisable."	2. Until
"Price to be paid for shares or debentures subscribed for or acquired under the option.	3.
"Consideration for the option or right to option."	4. Consideration :
"Persons to whom the option or the right to option was given or, if given, to existing shareholders or debenture holders as such, the relevant shares or debentures."	5. Name and addresses :
"Names, addresses, descriptions and occupations of vendors of property (1) purchased or.....acquired by the company within the two years preceding the date of this statement or (2) agreed to proposed to be purchased or acquired by the company except where the contract for its purchase or acquisition was entered into the ordinary course of business and there is no connection between the transaction and the company ceasing to be a private company or where the amount of the purchase money is not material.	
[illegible]	

tion paid or payable to each separate vendor".

"Amount paid or payable in cash shares or debentures for each such property, specifying the amount paid or payable for goodwill".

Total purchase price Rs.....
Cash .....Rs.....
Shares .....Rs.....
Debentures .....Rs.....
Goodwill .....Rs.....

"Short particulars of every transaction relating to each such property which was completed within the two preceding years and in which any vendor to the company or any person who is, or was at the time thereof a promoter, director, or proposed director of the company, had any interest direct or indirect."

"Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscription for any shares or debentures in the company; or rate of the commission.

Amount paid.....
Amount payable.....
Rate per cent.....

The number of shares, if any, which persons have agreed to subscribe for a commission.

If it is proposed to acquire any business the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the five years immediately preceding the date of this statement, provided that in the case of a business which has been carried on for less than five years, and the accounts of which have only been made up in respect of four years three years, two years or one year, the above requirements shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years, and in any such

case, the statement shall say how long the business to be acquired has been carried on.

Where, the financial year with respect to which the accounts of the business have been made up, is greater or less than a year, references to five years, four years, three years, two years and one year in this paragraph shall have effect as if references to such number of financial years as, in the aggregate, cover a period of not less than five years, four years, three years, two years, or one year, as the case may be, were substituted for references to three years, two years and one year respectively.

Dates of parties to, and general nature of—

(a) contact appointing or fixing the remuneration of directors, managing director, or manager ; and

(b) every other material contract other than (i) contract entered into in the ordinary course of the business intended to be carried on by the company or (ii) entered into more than two years before the delivery of this statement.

Time and place at which (1) the contracts or copies thereof ; or 2 (i) in the case of a contract not reduced into writing, a memorandum giving full particulars thereof and (ii) in the case of a contract wholly or partly in a language other than English, a copy of translation thereof in English or embodying a translation in English of the parts in the other language, as the case may be, being a translation certified in the prescribed manner to be a correct translation, may be inspected.

Names and addresses of the auditors of the company.

Full particulars of the nature and extent of the interest of every director, managing director, or manager, in any property purchased or acquired by the company within the two years preceding the date of the statement or proposed to be purchased or acquired by the company or. where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as a director, or otherwise for services rendered or to be rendered to the company by him or by the firm.

Rates of the dividends (if any) paid by the company in respect of each class of shares in the company in each of the five financial years immediately preceding the date of this statement or since the incorporation of the company, whichever period is shorter.

Particulars of the cases in which no dividends have been paid in respect of any class of shares in any of these years.

(Signatures of the persons above-named as directors or proposed to be directors or their agents authorised in writing).

.....
.....
.....

Date.....

In cases mentioned in Part II of this Schedule, the statement in lieu of prospectus must set out the reports specified therein. These cases are mentioned hereunder :—

(1) If unissued shares or debentures of the company are to be applied in the purchase of business, a report. This report has to be made by accountant who shall be named in the Statement. This report is to be upon (a) the profits or losses of

the business in respect of each of the 5 financial years immediately preceding the delivery of the Statement to the Registrar, and (b) the assets and liabilities of the business as at the last date to which the amounts of the business were made up.

(2) (a) If unissued shares or debentures of the company are to be applied directly or indirectly in any manner resulting in the acquisition of shares in a body corporate which, by reason of the acquisition or anything to be done in consequence thereof or in connection therewith, will become a subsidiary of the company, a report has to be made by accountant who shall be named in the Statement in respect of the profits and losses and assets and liabilities of the other body corporate in accordance with what is being stated in paragraphs (b) or (c) hereunder ; it should also indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of shares to be acquired, have concerned members of the company, and what allowance would have fallen to be made in relation to assets and liabilities so dealt with for holders of the other shares, if the company had at all material times held the shares to be acquired.

(b) *If the Other Body Corporate has no subsidiaries*, the aforesaid report shall so far as regards profits or losses, deal with the profits or losses of the body corporate in respect of each of the 5 financial years immediately preceding the delivery of the Statement. Likewise, the report shall, so far as regards assets and liabilities, deal with the assets and liabilities of the body corporate as at the last date to which the accounts of the body corporate were made up.

(c) *If the Other Body Corporate has Subsidiaries*, then the above-mentioned report shall, so far as regards profits and losses *deal separately with the other body corporate's profits or losses*, as provided by paragraph (b) above and in addition, the report shall deal as a whole with the combined profits or losses of its subsidiaries so far as they concern members of the other body corporate and so far it shall deal with the combined profits or losses of its subsidiaries. Similarly, so far as regards assets and liabilities, the report shall deal separately with the other body corporate's assets and liabilities as provided by paragraph (b) above. And in addition, the report shall (i) either deal as a whole with the combined assets and liabilities of its subsidiaries, with or without the other body corporate's assets and liabilities and (ii) deal individually with the assets and liabilities of each subsidiary ; and shall indicate, as regards the assets and liabilities of the subsidiaries, the allowance to be made for persons other than members of the company.

Part III of Schedule IV contains provisions which will apply to Parts I and II thereof. These provisions, being the same as those mentioned under Part III of Schedule III, are not reproduced here.

SCHEDULE V

(Section 159)

Every company having a share capital has to file with the Registrar of Companies an annual return containing the particulars specified in Part I of Schedule V. These are as follows :

(1) Address of the company's registered office.

(2) If any part of Members' or Debentureholders' Register is legally kept in any State or country outside India, the name of that State or country together with the address of the place where such part of the Register is kept.

(3) A summary distinguishing (wherever possible) between shares issued for cash, bonus shares, and shares other than bonus shares issued as fully or partly paid up otherwise than in cash. Also this summary has to specify in respect of each class of shares such particulars as (a) amount of nominal capital together with the number of shares into which it is divided, (b) number of shares taken, from the commencement of the company to the date of its last annual general meeting, (c) amount called up on each share up to the date of the last annual general meeting, (d) total amount of calls received up to the date, (e) total amount of calls unpaid on that date, (f) total amount of commission paid (if any) in respect of any shares or debentures up to that date, (g) discount allowed on issue of shares at a discount or so much of that discount as has not been written off at the date aforesaid, (h) total amount of discount allowed (if any) in respect of any debenture since the date of the annual general meeting with reference to which the last return was submitted. (i) total number of shares forfeited up to the date of the company's last annual general meeting, and (j) total amount of shares for which share warrants are outstanding at the date mentioned in (b) and of share warrants issued and surrendered respectively since the date mentioned in (h) and the number of shares comprised in each warrant.

(4) Particulars of total amount of company's indebtedness to be mentioned in (b) above in respect of all charges (including mortgages) which are required to be registered with the Registrar under Section 125 of the Act ; or which would have been required to be so registered if created on or after April 1, 1914.

(5) A list which must contain names, addresses, descriptions and occupations (if any) of all persons who, on the date of the last annual general meeting are members or debentureholders and of persons who have ceased to be members or debentureholders on or before that date and since the date mentioned in (h) above or in the case of the first return, since the incorporation of the company. The list also should state the number of shares or debentures held by each of the existing members or debentureholders at the date mentioned in (b) above ; also, it shall specify the number of shares or debentures transferred since the date mentioned in (h) above (or, in the case of the first return, since the company's incorporation) by them and by persons who have ceased to be members or debentureholders respectively, the date of registration of transfers and the names of transferees [illegible] ledger folio containing particulars thereof. If the names [illegible]

are not arranged in alphabetical order, the list must annex thereto an index sufficient to enable the name of any person therein to be easily found.

(6) With respect to the persons who are directors at the date of company's last annual general meeting, all such particulars as are required by this Act to be contained in the register of directors ; and with respect to any person who at the date is the manager or secretary, all such particulars as are required by this Act to be contained in the register of managers and secretaries together with all such particulars with respect to those who had ceased to hold such office (*i.e.*, the office of director, manager or secretary) on or before the date of the last annual general meeting and since the date mentioned in paragraph (3) (h) or in the case of the first return, since the incorporation of the company.

PART II OF SCHEDULE V cantains the form

Annual Return which is given below : Limited

ANNUAL RETURN ——————— made up to

the day of.....19 Private Limited

being the date of the last annual general meeting of the company

1. Address

(Address of the registered office of the company)

---

2. Situation of Foreign Registers and Debenture-holders :

(a) Name of every State or Country outside India in which foreign register is kept.

(b) Address of place in each such State or Country in which a foreign register is kept.

---

3. Summary of Share Capital and Debenture

(a) Nominal Share Capital.

Nominal share capital—Rs.—divided into :

(insert number and class) Shares of...each.
... ... Shares of...each.
... ... Shares of...each.
... ... Shares of...each.

(b) Subscribed Share Capital and Debentures :

	Number	Class	
Number of shares of each class taken up to the	...	...	shares
date of the last annual general meeting (which	...	...	shares
number must agree with the total shown in the	...	...	shares
list as held by members on that date).	...	...	shares
Number of shares of each class issued subject to	...	...	shares
payment wholly in cash.			

Number of shares of each class issued as fully paid up for a consideration other than cash.	... ... shares ... ... shares
Number of shares of each class issued as partly paid up for a consideration other than cash and extent to which each such share is so paid up.	... ... shares issued as paid up to the extent of Rs...per share ...Shares Issued as paid-up to the extent of Rs...per share ...Shares Issued as paid to the extent of Rs...per share ...Shares Issued as paid up to the extent of Rs...per ...shares
Number of shares (if any) of each class issued at a discount.	... ... shares ... ... shares ... ... shares ... ... shares
Amount of discount on the issue of the shares which has not been written off at the date of last annual general meeting.	Rs.....
Amount called upon number of shares of each class.	—(Rs...per share on... ...shares —(Rs...per share on... ...shares —(Rs...per share on... ...shares —(Rs...per share on... ...shares
Total amount of calls received, including payments on application and allotment and any sums received on shares forfeited.	...Rs...
Total amount (if any) agreed to be considered as paid on number of shares of each class issued as fully paid up for a consideration other than cash.	...Rs...on —... ... ...shares —... ... ...shares —... ... ...shares —... ... ...shares
Total amount (if any) agreed to be considered as paid on number of shares of each class issued as partly paid up for a consideration other than cash.	...Rs...on —... ... ...shares —... ... ...shares —... ... ...shares —... ... ...shares —... ... ...shares —... ... ...shares

Total amount of calls unpaid Rs.....

Total amount of the sums (if any) paid by way of commission in respect of any shares or debentures. Rs.....

Total amount of the sums (if any) allowed by way of discount in respect of any debentures since the date of the annual general meeting with reference to which the last annual return was submitted Rs.....

Total number of shares of each class forfeited, ...shares
... ...shares
... ...shares
... ...shares

Total amount paid (if any) on shares forfeited Rs.....

Total amount of shares for which shares warrants to bearer are outstanding Rs.....

Total amount of share warrants to bearer issued and surrendered respectively since the date of the annual general meeting with reference to which the last annual return was submitted, Issued Rs... Surrendered Rs...

Number of shares comprised in each share warrants to bearer, specifying in the case of warrants of different kinds, particulars of each kind .....

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4. Particulars of Indebtedness

Total amount of indebtedness of the company in respect of all charges (including mortgages) which are required to be registered with the Registrar under the Companies Act, 1956, or which would have been required so to be registered if created on or after the 1st April 1914. Rs.....

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5. List of past and present Members and Debenture holders

List of persons holding shares or stock in the company on the day of annual general meeting, namely, the.....day...of...19..., and of persons who have held shares or stock therein at any time since the day.....of 19...when the previous annual meeting was held, or in the case of the first return, at any time since the incorporation of the company.

Folio in register ledger containing particulars	Accounts of [illegible]	
Names, addresses, descriptions and occupations if any.	Particulars of [illegible] transferred since the date of the previous annual general meeting or, in the case of the first return, since the incorporation of the company by (a) persons who are still members and (b) persons who have ceased to be members	Name of transferees or the relevant ledger folio containing particulars thereof.
Father's or husband's name.		
Number of shares held by members at date of annual general meeting.		

Numbers Date of Registration of Transfer. (a) (b)

NOTES

1. If, either of the two immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming members since that date or to changes as compared with that date in the number of shares held by a member (as amended by GSR No. 221, dated 21st February, 1961).

2. If the names in the list are not arranged in alphabetical order, an index sufficient to enable the name of any person to be readily found must be annexed.

5. Particulars of Directors, Managers and Secretaries, past and present

A. Particulars of the persons who are directors of the company on the day of the last annual general meeting, namely, the.....day.....19.....and of persons who ceased to be directors on or before that date since the date referred to in sub-clause (h) of clause Part I Schedule V to the Companies Act, 1956 namely, the.....day of.....19.....or, in the case of the first return, since the incorporation of the company.

Present name or names and surname in full (a)	Any former name or names or surname in full	Nationality and usual nationality of residential origin if different address from present nationality.	Business occupation and particulars of directorships and managerships and secretaryships held in other companies, bodies corporate.	Date of birth	Date of appointment	Date of cessation if any
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

B. Contd.

C. Particulars of the person who is manager/secretary of the company on the day of the last annual general meeting, namely, the.....day of.....19.....and of the person(s) who ceased to be manager, secretary on or before that date and since the date referred to in sub-clause (h) of clause 3 of Part 1 of Schedule V to the Act, namely, the.....day of.....19.....or, in the case of the first return, since the incorporation of the company.

Present name or names and surname in full	Any former name or names and surname in full	Nationality and nationality or origin if different from present nationality	Usual residential address.	Business occupation and particulars of directorships, *managerships and secretaryships, held in other companies, bodies corporate	Date of appointment	Date of cessation, if any
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Note :—*Where the person holds the office of managing director, the fact should be specially mentioned.

Signed.....Director

Signed Director/Managing Director/Manager/Secretary

Act (XVII of 1969) has abolished managing agents and secretaries and treasurers as from 3rd April, 1970, though prior rights and liabilities are not affected thereby.

7. Names and addresses of and number of equity shares held by each of the following namely : (folio Nos. may also be given) :

	No. of shares	Amount	% of the total equity shares capital
(a) Foreign Holdings :			
(i) Foreign Collaborators			
(ii) Foreign Financial Institutions			
(iii) Foreign Nationals			
Total			
(b) Governments/Government Sponsored Financial Institutions			
(i) Life Insurance Corporation of India			
(ii) Unit Trust of India			
(iii) Industrial Finance Corporation			
(iv) Industrial Development Bank of India			
(v) Industrial Credit and Investment Corporation of India			
(vi) General Insurance Corporation of India			
(vii) National Banks			
(viii) Government Companies			
(ix) Central Government			
(x) State Governments			
(xi) State Financial Corporations			
Total			
(c) Bodies Corporate [not covered under (a) and (b) above]			
(d) Directors and their relatives (as defined in Section 6), their shareholdings and directorships			
(e) Other top 50 shareholders (other than those listed above)			

"Director" includes any person who occupies the position of a director by whatsoever name called, and any person in accordance with, whose directions of instructions the board of the directors of the company are accustomed to act.

"Name" includes "forename" and "surname" in the case of a person usually known by a title different from his surname, means that title.

"Former name" and "Former surname" do not include—

(a) in the case of a person usually known by a title different from his surname, the name by which he was known previous to the adoption of or succession to the title;

(b) in the case of any person, a former name or surname where that name or surname has been changed before the person having the name assumed

the age of eighteen years or has been changed or discussed for a period of not less than twenty years ; or

(c) in the case of a married woman the name or surname by which she was known previous to the marriage.

The names of all bodies corporate incorporated or carrying on business in India of which the director, *[**] manager or secretary is also a director, *[**] manager or secretary should be given, except bodies corporate of which the company making the return is the wholly-owned subsidiary or bodies corporate which are wholly owned subsidiaries either of the company or of another body corporate of which the company is the wholly-owned subsidiary. A body corporate is deemed to be the wholly-owned subsidiary of another if it has no members except that other and that other's wholly-owned subsidiaries and its or their nominees. *If the space provided in the form is insufficient, particulars of other directorship, *[**] managership, or secretaryship should be listed on a separate statement attached to this return.

Dates of birth need only be given in the case of a company which is subject to Section 280 of the Companies Act, 1956, namely, a company which is not a private company or which being a private company, is the subsidiary of a public company.

Where all the partners in a firm are joint secretaries, the name and principal office of the firm may be stated.

Delivered for filing by.....

CERTIFICATES

[Certificate to be given by a director and the Manager/Secretary or by two Directors of every Company].

We certify that the Return states the facts as they stood on the date of annual general meeting aforesaid correctly and completely.

Certificate to be given by a director and the Manager/Secretary or by two directors of every Private Company.

We certify that the Return states the facts as they stood on the date of the incorporation of the company/the annual general meeting with reference to which the last annual return was submitted issued any imitation to the public to subscribe for any shares or debentures of the company.

Signed————Director

Signed————Director/Managing Director/

Manager/Secretary

Further Certificate to be given as aforesaid if the number of Members of the Company exceeds fifty.

We certify that the excess of the number of members of the company over fifty consist wholly of persons who, under sub-clause (b) of clause (iii) of Section 3 of the Companies Act, 1956, are not to be included in reckoning the number of fifty.

Signed————Director

Signed————Director/Managing Director/

Manager/Secretary.

SCHEDULE VI

For this, students are advised to refer to I.S.P. Auditing 9.

Schedules VII and VIII dealing with Managing agents and Secretaries and Treasurers had been abolished with effect from April 3, 1970.

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL F.S.P. (NN) CL—8

FINAL COURSE (NN)
CORPORATE LAW
STUDY—VIII
Foreign Exchange Regulation Act, 1983

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Prescribed Readings

1. Exchange Control Manual—RBI Publication.
2. FERA—Ready Reference—A publication of the Institute of Company Secretaries of India.

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Introduction

The Act is based on different principles. It speaks of what must be done and what may not be done. But practically, every prohibitory section of the Act begins with the words, 'except with the previous general or special permission of the Reserve Bank". Thus, without issuing orders or telling the public what to do or not to do, the Reserve Bank or the Central Government issues licences or permissions empowering those concern to depart from the provisions of the Act. Some of these permissions or licences are of general character which authorise bankers, traders, stock-brokers or the general public to transact certain kinds of business; whereas others are of particular or special nature, which authorise certain banks or company or individual to carry out a certain transaction or in a certain manner. The idea behind this method of drafting the Act is to afford public an opportunity to know when they would require leave to undertake any kind of foreign exchange business.

The operation of exchange control in practice is worthy of note. Much of the work is delegated to authorised dealers. In certain matters, the Reserve Bank is required to be consulted. It is necessary to send returns to the Reserve Bank so that it is able to maintain effective control.

The various types of transactions involving purchase and sale of foreign exchange are—(a) imports and exports of goods, (b) payment of shipping, banking insurance and other services, (c) interest and dividend payments, (d) tourist and other overseas travel, (e) capital movements.

The Foreign Exchange Regulation Act of 1947 was replaced by the new Act of 1973 because of the pressure for controlling the leakage of foreign exchange. There was "the need for regulating, amongst other matters, the entry of foreign capital in the form of Branches and Concerns with substantial non-resident interest in them, the employment of foreigners in India etc." as its object. The preamble to the Act states the object thereof, which are: (a) conservation of the foreign exchange resources, and (b) proper utilisation thereof in the interests of the economic development of the country. The Act does not aim at attracting more and more of foreign exchange to Indian treasury; consequently, it is only restrictive and to that extent cannot be looked upon as forward looking Act.

The Foreign Exchange Regulation Act 1973 came into operation from 1st January, 1974 through a Notification issued by the Government of India. It extends to the whole of India. This Act was also made applicable to Sikkim from 1-9-1977 (vide Notification No. F/1/71/EC/75 dated 11-8-1977).

The Act of 1973 applies to all citizens of India, outside India and to branches and agencies outside India of companies or bodies corporate registered or incorporated in India. This provision is designed to prohibit all transactions in foreign exchange by persons who are residents of India, whether such transactions take place during their actual residents in India or during their visit to foreign lands. If it is professed that this prohibition under the Act does not extend to acts perpetrated outside India by resident of India then it would lead to evasion of the Act in large scale thereby frustrating its object (See *Shanti Prasad Jain* v. *The Director Enforcement, AIR 1962 S. C. 1764 at p. 1778*).

The control is exercised under the Act by : (a) the Central Government through the Department of Economic Affairs in the Ministry of Finance; and (b) the Reserve Bank of India through its Exchange Control Division. The Act empowers the Directorate of Enforcement to carry out investigations, enquiries, adjudications

and prosecutions for transgression of the provisions of the Act, excepting Secs. 13, 18 (1) (a) and 19 (1) (a) or of any rule, direction or order made thereunder. The Adjudication proceedings and Appeals Rules, 1974 were framed by the Central Government laying down procedural requirements regarding adjudication, proceedings under Section 51 (which is not included in your syllabus) and appeals to the Appellate Board against the order of an Adjudication officer. Apart from these, Authorised Dealers and Money-changers have also been charged with the responsibility to ensure the compliance with the provisions of the Act in any transaction conducted by or through them. In so far as the matters regarding imports and exports of goods, currencies, gold, securities directly involving compliance with Customs formalities are concerned, the Customs Department has been vested with the responsibility of enforcement in this behalf.

The Act regulates and controls certain important transactions of which only those which are included in your syllabus are mentioned below:

1. Dealings in foreign exchange (Sections 6,7,8,14);
2. Payments to non-residents, with reference to Blocked and Special Accounts and payments for exports from India (Sections 9,10,12,15,16, 18);
3. Imports and Exports of certain currency and bullion (Sections 13,17);
4. Export, Transfer, Custody, Issue and Acquisition of Securities (Sections 19,21,22,23);
5. Holding of Immovable property outside India (Section 25);
6. Acquisition and Holding of assets/immovable property by non-residents (Sections 11 and 31);
7. Persons residents in India associating themselves with or participating in concerns outside India (Section 27);
8. Appointment of certain persons and companies as agents or technical or management advisers in India (Sections 28,30);
9. Certain provisions as to companies (Sections 26).

Definitions (Section 2):

(*a*) *Appellate Board*: The Appellate Board has to be constituted under Section 52 (i) of the Act, which is outside the syllabus. Nevertheless, the students should know about the composition of such board. It shall consist of a chairman and such number of other members not exceeding 4; they are to be appointed by the Central Government. The Board shall hear appeals against the orders of Adjudicating officer made under Section 51. Such Board shall be styled as "Foreign Exchange Regulation Appellate Board" (FERAB).

(*b*) *Authorised Dealer*: The phrase means a person for the time being authorised under Section 6 to deal in foreign exchange. The Reserve Bank is empowered by Section 6, on an application to be made to it, to authorise any person to deal in foreign exchange. This authorisation has to be made in writing and may be unrestricted or restricted: in other words, the person authorised may be permitted to deal in all foreign currencies or he may be permitted to deal in specified foreign currencies. Further, such a person may be authorised to do transactions of all descriptions or only specified transactions. Furthermore, the authorisation may be

effective for a specified period or within the specified amounts. This authorisation can be granted subject to such conditions as may be specified therein.

(c) *Bearer certificates :* It means a certificate of title to securities by the delivery of which (with or without endorsement) the title to the securities is transferable. The holders of such securities get certificates which show their holdings. These securities can be transferred by means of a deed of transfer accompanied by the certificates. The Act lays certain restrictions on issue of bearer securities (vide Section 22 which will be discussed later in the study paper).

(d) *Certificate of title to a security* : It means any document used in the ordinary course of business as a proof of the possession or control of the security or authorising or purporting to authorise, either by an endorsement or by delivery to the possessor of the document to transfer or receive the security thereby represented.

(e) *Coupon* : It means a coupon representing dividend or interest on a security. This coupon is subjected to certain restrictions imposed by Section 19 (which will be discussed later in the study paper) of the Act.

(f) *Currency :* This word has not been actually defined. It only states that currency includes : (i) all coins (ii) currency notes; (iii) Bank notes; (iv) postal notes (i.e. bank notes intended to be sent through post office and made payable to order and thus they differ from the usual bank notes which are made payable to bearer); (v) postal orders; (vi) money orders; (vii) cheques; (viii) drafts; (x) travellers' cheques; (x) letters of credit; (xi) bills of exchange; and (xii) promissory notes.

(g) *Foreign currency* : It means any currency other than Indian currency.

(h) *Foreign Exchange* : This expression means foreign currency and embraces : (i) all deposits; (ii) credit balances payable in any currency; (iii) any drafts; (iv) traveller's cheques; (v) letters of credit; & (vi) bills of exchange expressed or drawn in Indian currency but payable in any foreign currency.

This expression also includes any instrument payable at the option of the drawee or the holder thereof or any part thereto either in Indian currency or in foreign currency or partly in one and partly in the other. It may be noted that such instrument may be considered as foreign currency only if the currency in which it may be paid is left to the option of the drawee or the holder of the instrument or any part thereto; also that if such instrument only visualises the payment in Indian currency it will not be regarded as foreign exchange.

(i) *Foreign security :* This expression means any security created or issued elsewhere than in India, and any security the principal or interest on which is payable in any foreign currency or elsewhere than in India. The term 'security' is defined in Section 2 (u) which will be discussed later on and includes shares, stocks, bonds, debentures, government securities, savings certificates, deposits receipts, units or sub-units and certificates of title to securities. Consequently, foreign security would mean any of the above-mentioned securities created or issued in any foreign country and in any security, the principal of or interest on which would be payable in foreign currency or in foreign country.

(j) *Gold* : It includes gold in the form of coin, whether or not legal tender, or in the form of bullion or ingot, whether refined or not, and jewellery or articles made wholly or mainly of gold. Further, the Explanation to this clause also states

that any jewellery or articles would be deemed be made wholly or mainly of gold if the value of the gold contained in the article exceeds such percentage as the Reserve Bank may, from time to time, notify. The Reserve Bank has since notified that the aforesaid percentage would be 40%. (vide Notification No. FERA 1/74-R.B. dated 1-1-1974).

(k) *Indian currency*: It means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under Section 28A of the Reserve Bank of India Act, 1934. That is to say special banks and special one rupee notes issued by the RBI under Section 28A of the RBI Act are specifically excluded from the term 'Indian currency' and they will be treated as foreign currency for the purposes of this Act.

(l) *Indian Customs Waters*: It means the waters extending into sea to a distance of 12 nautical mile measure from the appropriate base line on the coast of India and includes any bay, gulf, harbour, creek or tidal river.

(m) *Money exchanger*: He is a person for the time being authorised under Section 7 to deal in foreign currency. Section 7 empowers the Reserve Bank, on an application to be made to it, to authorise that person to deal in foreign currency. Such an authorisation has to be made in writing and may be unrestricted or restricted. Further, such person may be authorised to deal in foreign currency at a particular place only and his activities may be restricted for a specified period or within the specified amounts This authorisation may be subjected to such conditions as may be specified therein.

(n) *Overseas market*: This phrase, in relation to any goods, means the market in the country and outside India and in which such goods are intended to be sold.

(o) *Owner*: This term, in relation to any security, includes any person who has power to sell or transfer the security, or who has the custody thereof or who receives, whether on his own behalf or on behalf of any person, dividends or interest thereon, and who has any interest therein, and in a case where any security is held on any trust or dividends or interest thereon are paid into a trust fund: also "owner" includes any trustee or any person entitled to enforce the performance of the trust or to revoke or vary, or without the consent of any other person, the trust or any terms thereof, or to control the investment of the trust money. It would thus be seen that the definition of owner is also in relation to security as defined in the Act and includes: (i) an absolute owner; (ii) limited owner; (iii) benamidar; (iv) a trustee; and (v) a person with limited power to vary the terms of the trust.

(p) *Person resident in India*: 1. A citizen of India, who has at any time after 25-3-1947 been staying in India is included in the term "person resident in India" This clause, however, specifically excludes from its ambit, the following class of citizens: a citizen of India who has gone out of India or who stays outside India (a) for or on taking up employment outside India, or (b) for carrying on outside a business or vocation outside India, or (c) for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period is not included in the term "person resident in India". But, such person becomes "person resident in India" if he returns to or stays in India (a) for or on taking up employment in India; or (b) for carrying on a business or vocation in India, or (c) for any other purpose in such

circumstances as would indicate his intention to stay in India for an uncertain period. In all other circumstances than these, he will continue to be a person not resident in India for the purposes of thist Act.

2. Again, a citizen of India, who not having stayed in India at any time after 25-3-1947 comes to India (a) for or on taking up employment in India, or (b) for carrying on a business or vocation in India, or (c) for staying with his or her spouse (such spouse being a person resident in India) or (d) for any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period, would be included in the term "person resident in India".

Again, according to the Explanation, a citizen of India who not having stayed in India at any time after 25-3-1947 comes to India (a) for or on taking up employment in India, or (b) for carrying on a business or vocation in India, (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period, shall be deemed to be non-resident in India during any period in which he is outside India.

3. There may be persons who are not citizens of India but who would be included within the term "person resident in India", for the purposes of this Act. Such non-citizens are deemed to be persons resident in India when they come and stay in India (a) for or on taking up employment in India, or (b) for carrying on a business or vocation in India, or (c) for staying with his or her spouse (such spouse is a person resident in India) or (d) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

Students may also refer to discussion on "residential status" on pp. 18-20, given in the study paper

(q) *Person resident outside India*: He is a person who is not resident in India.

(r) *Precious stone*: It includes pearls and semi-precious stones and such other stones or gems as the Central Government may for the purpose of this Act, notify in this behalf in the Official Gazette.

(u) "Security" means shares, stocks, bonds, debenture stock, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), saving certificates to which the Government Saving Certificates Act, 1959 (46 of 1959), applies, deposit receipts in respect of deposits of securities, and units or sub-units of Unit Trusts and includes certificates of title to securities, but *does not include* bills of exchange or promissory notes other than Government promissory notes.

(v) "Silver" includes silver bullion or ingot, silver sheet and plates which have undergone no process of manufacture subsequent to rolling and uncurrent silver coin which is not legal tender in India or elsewhere and jewellery or articles made wholly or mainly of silver.

(w) "Transfer", in relation to any security includes transfer by way of loan or security.

ENFORCEMENT PROVISIONS UNDER THE ACT

Classes of officers of enforcement (Section 3)

This Section lays down that there shall be 5 classes of officers, viz., (a) Directors Enforcement; (b) Additional Directors of Enforcement; (c) Deputy Directors of Enforcement; (d) Assistant Directors of Enforcement; and (e) such other classes of officers of Enforcement as may be appointed for the purpose of this Act.

Prosecutions for infringement of the provisions of the Foreign Exchange Regulation Act are made by the Directorate of Enforcement who is in charge of Directorate of Enforcement set up by the Government and functions under the Cabinet Secretariat, Department of Personnel. The Directorate has Headquarters in New Delhi and branch offices at Bombay, Calcutta, Madras and at some other centres.

Appointment and Powers of Officers of Enforcement (Section 4)

By this section, the Central Government retains for itself the power to appoint such persons as it thinks fit to be officers of Enforcement—[sub-section (1)]. without prejudice to the provisions of sub-section (1), sub-section (2) enables the Central Government to authorise (i) Director of Enforcement, (ii) Additional Director of Enforcement, (iii) Deputy Director of Enforcement or (iv) Assistant Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement. It may be noted that the Central Government has authorised the Director of Enforcement to appoint officers of Enforcement below the rank of Assistant Director of Enforcement (vide Notification No. F 1/72/EC/73-2, dated January 1st, 1974).

The officers of Enforcement have to exercise the powers and to discharge the duties conferred or imposed on them under the Act, and they may be subject to such conditions and limitations, as the Central Government may impose upon them [sub-section (3)].

Enforcement and functions of Director or other officers of Enforcement (Section 5)

This Section enables the Central Government to authorise (i) any officer of customs, (ii) any Central Excise officer, (iii) any police officer, (iv) any officer of the Central Government, and (v) any officer of the State Government to exercise such of the powers and to discharge such of the duties which the Director of Enforcement or any other officer of Enforcement can perform as may be specified in the order issued by the Central Government. That is to say, Section 5 authorised the Central Government to take aid from various other departments of the Central Government as well as the State Governments and to use the officers thereof in effectively implementing the provisions of this Act.

FOREIGN EXCHANGE

The object of the Act is to conserve the foreign exchange resources of the country and to properly utilise the same. It is intended to ensure that "the country's foreign exchange resources are not wasted under any circumstances and are properly utilised to advance our national interest" [–vide the *Director, Enforcement Directorate, Government of India and others* v. *Saroj Kumar Bhotika* (1978) 48 Comp. Cas. 649 at 659. –] With these objectives in view, the Act accordingly makes elaborate provisions for the purpose of regulating dealings in foreign exchange.

It is worthwhile to recapitulate the definitions of "foreign exchange" and "foreign currency" discussed earlier in the study paper. Foreign currency means foreign currency (i.e. currency other than Indian currency) and embraces 6 items, e.g., all deposits; credit balances payable in any currency; any drafts; travellers' cheque; letters of credit and bills of exchange expressed or drawn in Indian currency but payable in any foreign currency. The last item, i.e. bills of exchange expressed or drawn in Indian currency but payable in any foreign currency has been included with a view to set at naught the controversy given rise to by the decision in *Abdul*

Shakoor Sheikh Dhanood v. *A.M. Chatterjee and Another* reported in *67 Bom. L.R. P. 552 = A.I.R. 1966 Bom. 109*. The facts of this case are as under :

One Abdul Shakoor was employed in Arabian American Oil Company in Saudi Arabia. In September, 1959 his services came to an end and he was given two cheques. He encashed one cheque in Saudi Arabia. The second cheque was drawn in Indian currency on "Netherland's Trading Society, Al Khobar in Saudi Arabia through the Netherland's Trading Society, Bombay. The cheque bore the endorsement "Pay to the order of Abdul Shakoor Rs. 16,504 31". Abdul Shakoor brought this cheque to India and gave to Badshah & Co. of Bombay, and Badshah & Co. paid to him the cash. Badshah & Co. sent the cheque by post to Batkal Provision Stores at Al Khobar in Saudi Arabia. The cheque was intercepted in transmission and was sent to the Enforcement Directorate. An enquiry was commenced and notice to show cause was issued against Abdul Shakoor asking him to show cause why adjudication proceedings as contemplated by Section 23D of the Foreign Exchange Regulation Act, 1947 should not be commenced against him for contravention of the provisions of Section 4(1) of the said Act. Abdul Shakoor admitted that he had encashed the said cheque with Badshah & Co., Bombay, and contended that he did not know that the said cheque was foreign exchange and that the Act applied to it. The Directorate of Enforcement, New Delhi, held that Abdul Shakoor was guilty for the contravention of Section 4(1) of the 1947 Act and imposed on him a penalty of Rs. 2,000. Thereupon, Abdul Shakoor challenged the said order by filing a writ petition in the High Court of Bombay. The Chief Justice and Mr. Justice Kotval allowing the writ petition and setting aside the order of the Directorate of Enforcement held that a cheque or a bill of exchange expressed or drawn in Indian currency, which is payable in India as well as in foreign currency is not foreign exchange within the meaning of the Foreign Exchange Regulation Act, 1947.

This lacuna in the previous Act has been corrected by the 1973 Act by including in the definition of foreign currency, bills of exchange expressed or drawn in Indian currency but payable in any foreign currency. In other words, the aforesaid decision of the Bombay High Court is no longer valid.

Licence for dealing in foreign exchange

(a) Authorised dealers (Section 6) : By sub-section (1) the Reserve Bank of India is empowered to authorise any person to deal in foreign exchange.

Sub-section (2) speaks of the terms of authorisation. Authorisation is required to be made in writing and may be unrestricted or restricted, i.e., the person authorised (or the bank authorised) may be permitted to deal in all foreign currencies or may be permitted to deal in specified foreign currencies. Further, such person (or bank) may be authorised to enter into transactions of all descriptions or his activities may be restricted to specified transactions only. Furthermore, the authorisation may be effective for a specified period or within the specified amounts. The Reserve Bank may grant the authorisation subject to such conditions as may be stipulated in the authorisation.

In a way, the authorised dealers act as instruments for ensuring compliance with the provisions of the Act. By virtue of sub-section (4) the authorised dealers are under an obligation not to engage in foreign exchange which is not in conformity with the general or special directions or instructions as may have been issued by the Reserve Bank from time to time.

Sub-section (3) further casts an obligation upon authorised dealers to seek information. An authorised dealer has the power, which power must be exercised, to require any person with whom he has to deal to make such declaration and give such information as may be necessary to satisfy the authorised dealer that the transaction does not involve any contravention or evasion of the provisions of this Act or of any rules, notifications, directions or orders made thereunder. If such person refuses to comply with such requirements or does not satisfactorily comply therewith, the authorised dealer is under an obligation to refuse to undertake the transaction. It is also enjoined upon the authorised dealer to report the matter to the Reserve Bank if he has reason to believe that the person he intended to deal with had designs to contravene and evade the provisions of this Act or the regulations framed thereunder.

By virtue of sub-section (3) an authorisation, once granted, may be revoked by the Reserve Bank at any time on the following grounds, namely :

(1) if the Reserve Bank is satisfied that the revocation would be in the public interest; or

(2) if the authorised dealer has not complied with the conditions of the authorisation or has contravened any of the provisions of this Act or of any rule, notification, direction or order made thereunder. But before an authorisation can be revoked, the Reserve Bank is obliged to afford an opportunity to the authorised dealer to make a representation in the matter.

(*b*) *Money-changer*: Section 7 deals with Authorised Money-Changers. Whereas authorised dealers are empowered to deal in foreign currencies whether sterling or otherwise, authorised money-changers are only empowered to purchase foreign currency of such description as may be empowered by the authorisation in writing. No authorised money-changer is allowed to sell any foreign currency. He has to surrender foreign exchange after purchase to an authorised dealer or to the Reserve Bank of India. A number of hotels, with tourist trade, are now given authorisation as money-changers and therefore empowered to accept foreign exchange or foreign currency.

The provisions of Section 7 are exactly the same as those of Section 6, discussed above. It would be evident from the preceding paragraph that Section 7 is intended to provide facilities of encashment of foreign currencies for tourists, etc. at places of tourist interest and other centres. For the purpose of Section 7, foreign exchange denotes foreign currencies in the form of notes, coins and travellers' cheques; dealing denotes buying of such foreign currencies as stated above or selling of foreign currencies in the form of notes and coins.

Under sub-section (1) the Reserve Bank, on an application to be made to it, is empowered to authorise a person to deal in foreign currency as a money-changer. Under sub-section (2) such an authorisation has to be made in writing and may be restricted or unrestricted. This means that the person authorised may be permitted to deal in all foreign currencies or he may be permitted to deal in specified foreign currencies. Further, such person may be authorised to deal in foreign currency at a particular place only and his activities may be restricted for a specified period or within the specified amounts. This authorisation can be granted subject to such conditions as may be stipulated in the authorisation. The authorisation issued by the Reserve Bank of India to hotels, Government shops and other establishments to act as money-changers usually carry out the following conditions :

(i) payment in foreign currencies (i.e. notes, coins and travellers' cheques) will be accepted by the licensee only to the extent necessary to meet cost of goods and/or services supplied by him to the customer. The licensee cannot exchange foreign currency for Indian currency;

(ii) all foreign currencies thus accepted by the licensee will be sold by him to an authorised dealer in foreign exchange in India immediately;

(iii) the foreign currency will be accepted by the licensee from his customers at the same rate of exchange at which the licensee is able to sell them to an authorised dealer in foreign currency;

(iv) all such purchases of foreign currency will be at the licensee's own risk and responsibility;

(v) a monthly statement of foreign currency thus purchased from customers and sold to authorised dealers in foreign exchange will be submitted by the licensee to the bank : and

(vi) a register in the prescribed form will be maintained to record all foreign currencies accepted from customers and sold to an authorised dealer.

Sub-section (3) provides for revocation of the authorisation of the money-changer on the following grounds, namely—(i) if the Reserve Bank is satisfied that the revocation would be in the public interest; or (ii) if the money-changer has not complied with the conditions of the authorisation or has contravened any of the provisions of this Act or of any rule, notification, direction or order made thereunder. But before an authorisation of the money-changer is revoked. the Reserve Bank shall afford an opportunity to the authorised dealer to make a representation in this behalf. The provisions of sub-sections (4) and (5) of Section 6 are, *mutatis mutandis*, applicable to money-changers.

Restrictions on dealings in foreign exchange

(*i*) *Dealings in foreign exchange prohibited* : Except with the previous general or special permission of the Reserve Bank—(i) no person in India and (ii) no person resident in India, outside India shall (a) purchase or otherwise acquire or (b) borrow from or (c) sell or otherwise transfer, or lend to or exchange with any person any foreign exchange. [Section 8(1)]. The expressions "in India" and person "resident in India", referred to above have been explained in *Bhagwandas Goenka* v. *Union of India AIR 1961 Mad. P. 47.* In the above case, it has been laid down thus : The distinction between "in" and "resident in" clearly implies that what is intended is a description of quality, namely, of "ordinarily continuous residence" and a purely temporary stay abroad will not make Section 9 of the 1947 Act corresponding to Section 14 of the 1973 Act) less applicable. According to the proviso to sub-section (1) nothing in this sub-section shall apply to an authorised dealer: this sub-section does not affect purchase or sale of any foreign currency effected in India between any person and moneychanger. According to the Explanation to sub-section (1) a person who deposits foreign exchange with another person shall be deemed to lend foreign exchange to such other person. It may be noted that according to the aforesaid Explanation, even deposits of foreign exchange or opening of an account in foreign exchange by one person with another is regarded as lending of foreign exchange to such other person. This explanation seems to have been added as a result of Supreme Court decision in *Shanti Prasad Jain* v. *Director of Enforcement AIR 1962 SC 1764.* Justice Ivar observed thus : "a contingent date is strictly speaking not a date at all in its ordinary as well as in its legal sense, a date is a sum of money payable

under an existing obligation. It may be payable forthwith, *solvendum in praesenti*, then it is a date 'due' or it may be payable at a future date, *solvendum futuro*; then it is a date 'accruing; But in neither case it is a date. But a contingent date has no present existence because it is payable only when the contingency happens, and ex-hypothesis that may or may not happen". It was subsequently held that if a person had only a contingent right to the amounts standing in credit to his account in a foreign country and there was no difference due to him in *praesenti* because a contingency on which his title to the amounts in deposits would arise was wholly beyond his control, then there was no lending by those amounts to the bank by that person within the meaning of Section 4 of the 1947 Act (corresponding to Section 8 of the 1973 Act).

The Court further observed that "the law is well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use moneys without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself or by some other persons, provided the customer accepts them. There might be special arrangements under which a banker might be constituted a trustee, but apart from such an arrangement, his position *qua* banker is that of a debtor, and not trustee".

"Therefore, the fact that money has been put in a bank does not necessarily import that it is deposited in the ordinary course of banking. We have to examine the substance of it to see whether it is in fact or not". In the instant case, "an account was opened in the bank with a view to effectuate the arrangement between the German firm and the appellant, which was that the amounts were to be repaid to the depositors as price of new machines to be supplied by them and the appellant was not to operate it except for that purpose. The bank was informed of this arrangement and took the deposits with note of the rights of the parties therein. Under the circumstances, the bank has really only custody of the money as if it were stake-holder, with a liability to hand it over to the persons who would become entitled to it under the arrangement. On these facts, it cannot be said that there is a deposit in a commercial sense of the word. It would be more correct to say that bank holds the money under a special arrangement which constitutes it not a debtor, but a sort of stake-holder".

(2) Conversion of currencies prohibited [Sub-section (2)] :

Except with the previous general or special permission of the Reserve Bank (i) no person, (ii) no authorised dealer, and (iii) no money-changer shall enter into any transaction which provides for conversion (a) of Indian currency into foreign currency, or (b) of foreign currency into Indian currency at rates of exchange other than (i.e. different form) the rates for the time being authorised by the Reserve Bank.

(3) Foreign exchange to be sold to authorised dealers only [Sub-section (3)] :

In a case where any foreign exchange is acquired by any person other than an authorised dealer or a money-changer, for any particular purpose, or in a case where any person has been permitted conditionally to acquire foreign exchange, the said person (i) shall not use the foregin exchange so acquired for any other purpose, or (ii) shall not fail to comply with any condition to which the permission is subject

to. And (i) where any foreign exchange was acquired cannot be so used (i.e. for the purpose for which it is granted), or (ii) where the conditions imposed on the permission cannot be complied with, the said person shall within the period of 30 days from the date on which he comes to know (a) that such foreign exchange cannot be so used, or (b) that the conditions of permission cannot be complied with, sell the foreign exchange to an authorised dealer or to any money-changer.

(4) Interpretation clause [Sub-section (4)] :

Where a person acquires foreign exchange for sending or bringing into India any goods, but

(i) sends or brings no such goods, or

(ii) does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time, or

(iii) sends or brings any goods of a kind, quality, or quantity different from that specified by him at the time of acquisition of the foreign exchange.

Such person, shall, until the contrary is proved be presumed

(i) not to have been able to use the foreign exchange for the purpose for which he acquired it, or (as the case may be)

(ii) to have used the foreign exchange (so acquired) otherwise than for the purpose for which it was acquired.

In other words, the above mentioned provisions clarify that the acquisition of any foreign exchange for sending or bringing into India any goods will not be deemed to have been used for the purpose for which it has been so acquired if such goods are not sent or brought into India within a reasonable time or if the goods sent or brought into India are of a value, time, quality or quantity different from that specified at the time of acquiring such foreign exchange.

(5) Internal transaction not affected [Sub-section (5)] :

It merely states that Section 8 does not in any way prohibit person from buying any foreign exchange from any post office in the form of postal orders or money orders.

(6) Inapplicability of Restrictions provided in Sub-section (1) in some cases :

These restrictions are inapplicable to (i) maintenance of, and operations on, an account expressed in foreign currency, by foreign citizens in or resident in India but not permanently resident therein. [Notification No. FERA 3/74 R.B. dated 1-1-1974] ; and (ii) opening and operation of an account in foreign exchange with a bank situate outside India by a person resident in India during his stay out of India. [This is subject to condition that the deposit in such account is made out of—(i) foreign exchange obtained from an authorised dealer or a money changer, in India, or (ii) foreign exchange received outside India by way of scholarship or stipend, by way of salary or payment for services not arising from any business in, or anything done while in India. The permission under the above is available to a person only if he has informed the Reserve Bank in writing of the details of receipt of such foreign exchange. The permission ceases to be effective as soon as such person returns to India.] [Notification No. FERA 4/74-R.B. dated 1-1-1974].

Subject to certain conditions a person has also been permitted to acquire foreign exchange—

(a) by way of scholarship or stipend from a charitable trust or educational trust or foundation or from a foreign government to enable him either to undergo a course of studies or training or both. It has been provided that a person who acquires foreign exchange as aforesaid and to whom or for whose benefit foreign exchange has been sanctioned by the Reserve Bank for meeting any part of his expenses outside India or who has applied or intends to apply for such sanction, shall make a report to the Reserve Bank, giving details of the foreign exchange so acquired, within 3 months of acquisition;

(b) by way of income on assets held outside India or by way of inheritance, settlement or gift;

(c) from any person not in India, by way of remuneration for services whether in or outside India, or any settlement of lawful obligation: it has been provided that a person who acquires foreign exchange as clause (b) or clause (c) shall, if he is an Indian citizen and receives foreign exchange in India, within 7 days from its receipt, and in other cases, within 3 months from its receipt, offer it or cause it to be offered for sale to the person, and in the manner laid down in the Central Government's Notification No. GSR 839 [F/1/3/EC/73] dated June 15, 1977. It has further been provided that in the case of a person resident outside India, the application to offer or cause to be offered for sale to an authorised dealer foreign exchange earned by such person by way of remuneration for services rendered outside India, shall not arise until such person ceases to be resident outside India and shall extend only to the amount of such foreign exchange owned by him when he ceases to be resident outside India. It has also been provided that when such foreign exchange is brought or sent into India, the person bringing in or, as the case may be, receiving it, shall, before the expiry of 7 days from the date on which it is brought or, as the case may be, received, offer it for sale or cause the same to be offered for sale to any authorised dealer, and in the manner laid down in the Central Government's Notification No. GSR 839 [F/1/3/EC/73] dated June 15, 1977 [vide Notification No. FERA 47/77-R.B. dated 24-11-1977.]

With a view to removing the public impression that exchange of foreign currency into Indian rupees through authorised dealers by persons normally resident in India is subject to restrictions, the Reserve Bank has clarified through its Press Release No. 1979-80/31 dated August 3, 1979 that" authorised dealers in foreign exchange and money-changers are permitted to purchase foreign currency notes even from persons normally resident in India, besides tourists on temporary visits to the country. This freedom has been allowed to facilitate exchange into Indian rupees of foreign currency notes received by such persons from foreign visiting tourists in genuine circumstances. While no hindrance thus exist, in the way of the public exchanging foreign currency (received in genuine circumstances from overseas tourists) in this manner, it is an offence under Foreign Exchange Regulation Act, if the foreign exchange so acquired is retained by any person or sold or sent to any person other than an authorised dealer or money-changer".

Acquisition of foreign exchange by the Central Government (*Section 14*) : The Central Government is empowered by this section to acquire foreign exchange in certain cases by ordering through a notification or otherwise that :

(a) every person in, or resident in, India must sell the foreign exchange to the Reserve Bank or to a person authorised by it for the purpose, at a specified rate

which should not be less than the price calculated at the rate of foreign exchange for the time being authorised by the Reserve Bank;

(b) the above-mentioned person must transfer to the Reserve Bank of the right to receive foreign exchange on payment of specified consideration to be fixed by the Central Government having regard to the rate of exchange for the time being authorised by the Reserve Bank under Section 8(2) for conversion of such foreign currency into Indian currency.

According to the first proviso to the section, the Central Government may provide for exemption from the operation of orders issued for acquisition of foreign exchange. According to the second proviso to the section, such an order will also not apply to any foreign exchange acquired by a person from an authorised dealer or from a money-changer and retained by him with the permission of the Reserve Bank for any purpose.

In the matter of surrender of foreign currency balances, in exercise of the powers conferred by Section 14, the Central Government issued a notification (vide Notification No. F/1/3/EC/77 dated June 15, 1977 published in the Gazette of India, vide GSR 839 dated 2-7-1977) by dint of which it directed every person in, or resident in, India who owned or held any foreign exchange whether in India or abroad, expressed in any currency other than the currency of Nepal or Bhutan, on the date of the notification, to offer it for sale to any authorised dealer at the prevailing rate of exchange within one month. In the case of foreign exchange owned or held subsequent to this notification, the offer for sale is required to be made within 3 months from the date so owning or holding. The aforesaid Notification exempts certain persons from its operation. In other words, this order shall not apply to : (a) such foreign exchange held by authorised dealers within the scope of their authority; (b) persons authorised by the Reserve Bank to hold such foreign exchange for business or for purposes within the scope of the authorisation in their favour; (c) maintenance of, and operation of any account in foreign currency maintained outside India by foreign citizens in or resident in, India but not permanently resident therein; (d) any sum held in any account in foreign currency, not being a sum expressed in pound sterling and held on or before 8th July, 1947, if such account is maintained in pursuance of the general or special permission of the Reserve Bank; (e) foreign exchange acquired or received in pursuance of permission granted by the Reserve Bank under Section 8 or as the case may be, under Section 9 of the said Act, if the person so acquiring or receiving such foreign exchange complies with the conditions subject to which such permission has been granted and (f) holding in India of foreign currency in the form of travellers' cheques, currency notes, bank notes and coins by foreign citizens, in, or resident in, India but not permanently resident therein.

In the matter of foreign currency assets of Indians returning to India "under a scheme operated by the Reserve Bank since June 8, 1972, the Indians resident abroad desiring to return to India for exploring possibilities of securing suitable employment or setting up small-scale industrial units are granted, on the merits of each case, exemption, upto a period of 3 years from the date of their return to India, from the statutory exchange control requirement of surrendering their foreign currency balances within 30 days of their arrival in the country. Such persons are permitted on application to retain the foreign currency balances and make use of them for approved purposes. Alternatively, they could surrender the foreign currency balances to an authorised dealer in foreign exchange with a right to transfer the amount of foreign currency so surrendered in the event of their deciding to go back

to a foreign country within 3 years [now within 5 years instead of 3 vide A.D. (M.A. Series)—Circular No. 15/1979 dated September 26, 1979 of the Reserve Bank] Persons wishing to avail of these facilities are required to declare their foreign currency assets to the Central office of the Exchange Control Department of the Reserve Bank at Bombay in the prescribed form within 30 days [now 3 months instead of 30 days—vide A.D. (M.A. Series)—Circular No. 9/79 dated June 15, 1979 of the Reserve Bank] of their arrival in India and to seek the permission of the Reserve Bank to retain them or surrender them with right of transfer. It is further observed that many Indians who return to India from abroad and wish to avail of these facilities do not declare their foreign currency balances to the Reserve Bank within the prescribed period of 30 days [now 3 months instead of 30 days] from their return to India. Apart from the fact that the retention of foreign currency balances beyond the period of 30 days (now 3 months instead of 30 days) without Reserve Bank's prior approval constitutes an infringement of the provisions of Government of India's Notification No. F. 1 (67) EC/57 dated September 25, 1958 and hence an offence punishable under the Act, late declaration of such foreign currency balances may delay the grant of exemption by the Reserve Bank. Persons returning to India and holding foreign currency balances and/or other assets who wish to avail of the facilities under the scheme are, therefore, advised, in their own interest, to declare such assets to the Reserve Bank within 30 days (now 3 months instead of 30 days) of their return to India as required". [Press Release No. 159/1976-77 dated February 7, 1977 issued by the Reserve Bank of India.]

Under Returning Indians' Foreign Exchange Entitlement scheme, "non-resident Indians and persons of Indian origin returning to India on or after 9th November, 1973 for permanent settlement will be eligible for foreign exchange entitlement for a certain specified personal purpose, to the extent of 25% of the total amount of foreign exchange remitted by them to India on transfer of residence, under the new scheme announced by the Reserve Bank. The approved purposes for which the exchange can be utilised are visits to foreign countries by the entitlement holder and/or members of his family for personal reasons and medical treatment, education abroad of dependent children and wards, gifts to close relatives residing abroad, and import of special appliances for professional use. The foreign exchange release will be available for a maximum period of 10 years from the date on which the non-resident returns to India. The entitlement will be available also against the balances held in non-resident (external) accounts or in foreign currency, (non-resident) accounts by the non-resident with banks in India as on the date of his arrival in India, but not against other remittances made prior to his return. Persons wishing to avail themselves of the facility are required to submit their applications in the prescribed form through an authorised dealer in foreign exchange to the Regional Offices of the Exchange Control Department of the Reserve Bank within 3 months of their arrival in India. Forms of application will be available within 3 months of their arrival in India. Forms of application will be available with authorised dealers. Non-resident Indians and persons of Indian origin coming to India to explore possibilities of securing employment or setting up small-scale industrial units in India, i.e. without a firm intention to settle permanently in India, will continue to be permitted (under the scheme announced by the Reserve Bank on June 8, 1972) to retain their foreign currency balances abroad for a period of 3 years [now 5 years instead of 3—vide A.D. (M.A. Series)—Circular No. 15/79 dated September 26, 1979 of the Reserve Bank] or seek the option of the repatriation of the entire foreign exchange with a right to reconversion in the event of their leaving India within 3 years (now 5 years instead of 3). Persons availing of the facilities under the scheme will also be eligible for entitlement under the new scheme against the foreign

exchange repatriated by them, provided they take permanent residence in India and undertake not to claim reconversion within three years". [Vide Press Note dated October 22, 1977.]

PAYMENTS

The relevant provisions in respect of payments which have foreign exchange implications are mainly contained in Sections 9, 10, 12, 15, 16 and 18.

(a) *Restrictions on payments (Section 9)* : This Section imposes certain restrictions on payments to, and received from, any person resident outside India. It prohibits any monetary transaction between a person resident in India and a person resident outside India unless a general or special permission has been obtained from the Reserve Bank for the purpose. Section 9 is designed to stop any monetary transaction between a resident and a non-resident (without the general or special permission of the Reserve Bank) so as to stop export or flight of Indian capital. It is obviously designed to stop monetary dealings between a resident and a non-resident but does not apply to transactions between residents of India where no foreign exchange is involved (see *Rabindra N. Mitra* v. *Life Insurance Corporation AIR 1964 Cal. 141*). The monetary transactions which are prohibited, as aforesaid, are contained in sub-section (1) of section 9. These are as follows :

(1) **Payment to non-residents** : A person in India and a person resident in India cannot make any payment to or for the credit of any person resident outside India. The effect of this clause is to prohibit payments to persons outside India either directly or indirectly i.e. by making actual payment or by crediting their accounts. It applies to Indian currency as well as foreign currency.

(2) **Receipts for and on behalf of a non-resident** : A person in India and a person resident in India cannot receive any payment by order or on behalf of any person resident outside India except through an authorised dealer. For purposes of this clause where any such person receives any payment from or on behalf of any person resident outside India through any person (including an authorised dealer), without a corresponding inward remittance from any place outside India, then such person shall be deemed to have received such payment otherwise than through an authorised dealer.

Firstly, by the above clause, the receipt of payments from persons resident outside India is permissible if it is done through an authorised dealer. The Explanation added to the clause clarifies that there ought to be corresponding inward remittance from the place outside India; otherwise the transaction will not be protected and it will be considered to have taken place "otherwise than through an authorised dealer", even though actually the payment might have been received through an authorised dealer. The Explanation prohibits any intermediate transactions and emphasises the fact that the transaction should be direct and straightforward and there must be direct corresponding inward remittance.

(3) **Creating or transferring a right to receive payment by a non-resident** : A person in India and a person resident in India cannot draw, issue or negotiate any bill of exchange or a promissory note in favour of any person outside India; he cannot also acknowledge any debt so that a right whether actual or contingent is created or transferred in favour of any person outside India. Thus, this clause prohibits drawing, issuing or negotiating any bill of exchange or promissory note and also acknowledgement of any debt, if the effect of such acknowledgment is such

that it might create or transfer some right in favour of a person outside India. Consequently not only payment to a person outside India is prohibited, but the creation or transfer of any right in favour of such person is also prohibited.

(4) Payment to third person for and on behalf of non-resident :

A person in India and a person resident in India cannot make any payment to any person or to the credit of any person by order or on behalf of any person resident outside India. It may be noted that this provision prohibits making of any payment in a manner to any person, at the instance of or on behalf of any person resident outside India. It is immaterial whether such payment is to be made in India or outside India and in what currency. This clause is designed to prohibit persons resident outside India from making payments to persons in India through medium of agents and such agents making payments in India on behalf of persons resident outside India commit offence under this clause. This practice has been prevailing in India in a very large measure and thereby the country is deprived of its valuable foreign exchange and this foreign exchange is finally utilised for smuggling of foreign goods and gold into India.

The impact of the phrase "by order or on behalf of any person resident outside India" needs elaboration. If a situation of making payment by order or on behalf of any foreigner arises then such payment can only be made with the approval of the Reserve Bank. Where a foreigner executes a deed of gift in favour of a person resident in India, it would immediately have the effect of divesting himself of his title and interest in the estate and vesting of the same in the donee who is a resident in India. Now, if the donee calls for payment of rents from tenant lodged in that property, he cannot be deemed to be asking for payment on behalf of the foreign donee but on his own behalf as the owner of the property (vide *George Elwin King* v. *The Reserve Bank of India, A.I.R. 1974 All. 452 at p. 453*). It is worthy of note that Section 9 (1) restricts payments to or receipts from non-resident; but it does in no way prohibit a person who earns foreign money during his residence in a foreign country for spending it on his own self. The infraction of the Section would arise only if the foreign currency is paid to another person or credited to the account of another person. In other words, he by merely spending money on himself, cannot be said to have transgressed the provisions of the section (vide *M S. M. Syed Mohammad Bukhari* v. *The Director of Enforcement, New Delhi and Others, A.I.R. 1977 Mad. 23 at p. 25*).

(5) Placement to the credit of a non-resident : A person in India and a person resident in India cannot place any sum to the credit of any person resident outside India. This clause has been enacted as a necessary corollary to clause (4) above with a view to ensuring strict compliance with the same. Here no question of any actual payment arises. Mere placement of any sum to the credit of any person resident outside India without the necessary permission will amount to an offence. (Attention is also invited to Section 73 (1) (e) which is excluded from the syllabus).

(6) Receipt or payment relating to acquisition of property outside India :

A person in India and a person resident in India cannot make any payment to or to the credit of any person or cannot receive any payment for or by order or on behalf of any person as consideration for or in association with—(i) the receipt by any person of a payment or the acquisition by any person of property outside India; (ii) the creation or transfer in favour of any person of a right (whether actual

or contingent) to receive payment or acquire property outside India. Transfer of rupees between persons resident in India against transfer of money or property or creation of rights to receive payment or acquire property outside India is prohibited by this clause. This clause prohibits the making of any payment or receiving of any payment to or from any person as consideration for or in association with any of the above matters.

(7) Creating or transferring a right to receive payments in relation to acquisition of property outside India :

A person in India and a person resident in India cannot draw, issue or negotiate any bill of exchange or promissory note or transfer any security or acknowledge any debt (so that a right, whether actual or contingent) to receive a payment is created or transferred in favour of any person as consideration for or in association with any matter referred to in the preceding clause (6). In other words, this clause prohibits drawing, issuing or negotiating any bill of exchange or promissory note or transferring any security or acknowledgement of any debt as consideration for or in association with any of the above matters.

Residential Status : Read Section 2 (p) and (q) which have been discussed in detail earlier in the study paper. You will have recapitulated that according to Section 2(p) there are four categories of persons who are persons resident in India, *viz.*, (1) an Indian citizen who has been staying in India at any time after the 25th day of March 1947 and has not gone out of or stays outside India for or on taking up employment outside India, or for carrying on a business or vocation outside India, or for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period; (2) an Indian citizen who had gone out of or stayed outside India but returns to or stays in India for or on taking up an employment in India, or for carrying on a business or vocation in India, or for any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period; (3) a citizen of India, who not having stayed in India at any time after 25-3-1947 comes to India for or on taking up an employment in India, or for carrying on a business or vocation in India, or for staying with his or her spouse, (such spouse being a person resident in India), or for any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period; (4) a person, not being an Indian citizen who comes to and stays in India for or on taking up an employment in India, or for carrying on a business or vocation in India, or for staying with his or her spouse (such spouse is a person resident in India), or for any other purpose.

Now a question may reverberate in your mind : what is the material consideration for determining the residential status of a person ? It is the possibility of his staying in or outside India for an uncertain period. You will have noticed from above that the definition lays down certain circumstances of going or staying outside India or returning to or staying in India which would give rise to a presumption—irrebuttable in character—as to the possible stay in or outside India for an uncertain period. The phrase "for any other purpose" mentioned in the preceding paragraph calls for an explanation.

This phrase together with the expression "specified purposes" only suggests that the purpose of coming to or going outside India is relevant to the extent of showing possibility of stay in or outside India for an uncertain period, the only distinction between these two phrases mean that in the case of "for any other purpose" such possibility is statutorily presumed which is irrebuttable, while in the

case of "specified purposes" which possibility has got to be discerned and determined on the basis of the facts and circumstances of each case. Accordingly, an Indian resident going abroad temporarily for reasons other than employment or business or vocation, shall still continue to be a resident in India during such temporary stay abroad. Likewise, a person who comes to India on temporary visits shall not be regarded as a resident of India despite such temporary stay in India. A distinction has been made by Section 9 between physical presence and resident in India by using expressions like "persons in India" and "persons resident in India". [For the distinction between "in India" and "resident in India" the student is referred to Bhagwandas Goenka case discussed under the sub-heading (a) "dealings in foreign exchange prohibited" under the main heading "restrictions on dealings in foreign exchange". Also see *M.S M. Syed Mohammad Bukhari* v. *The Director of Enforcement, New Delhi and Others A.I.R. 1977 Mad. 23 at p. 25*]. But it may be noted that the definition of "persons resident in India" pertains to Indian citizens. By virtue of the Citizenship Act, 1955, only an individual is capable of being a citizen of India; that is to say only natural persons in contradistinction to artificial persons can have the status of a citizen in India [*vide State Trading Corporation of India Ltd.* v. *Commercial Tax Officer, A.I.R. 1963 S.C. 1811.* [Consequently, the residential status of companies and other legal persons is determinable only with reference to the category of person not being an Indian citizen, who comes to, or stays in India for any of the 4 specified purposes mentioned in Section 2(p). Both natural person and an artificial person (e.g. companies, body of individuals etc.), fall within the purview of the term "person". Since a *juridica persona* is incapable of marrying, the provision relating to residential status based on stay with a spouse does not apply to such person. Vocation also is referable more to an individual than to a legal person. Since the provisions in respect of employment and business could be, with all appropriateness, apply to legal persons, their residential status would be determined accordingly. It does not appear that these provisions can be regarded as exhaustive by reason of the fact that the residuary clause includes any other purpose. The term "other purposes" is too wide to be enumerated exhaustively. But that it is possible to determine the residential status of a legal person under the residuary clause cannot be over-ruled. Therefore, the residential status of a company, firm, association of individuals and other artificial person is determinable with reference to stay in, or visits to India on account of employment, business or for any other purpose than stay with a spouse.

The definition as contained in Section 2 (p) being exhaustive, reference to general law in order to determine the residential status of a company, firm or association of individuals etc. is not permissible. Section 2(p) can be invoked for determining the residential status of a person at a given time and as such the residential status of a person may differ at different times depending upon the facts and circumstances of each case. Therefore, Section 2(p) cannot be said to be intended to assist in determining the permanence of the residential status. For example, a person may be resident in India at a given time but he may not be a permanent resident in India. The issue whether a person resident in India is also a permanent resident in India would assume importance because of the fact that the Reserve Bank has meted out distinct treatment to a person who is not a permanent resident in India in certain cases. The Reserve Bank has granted permission for maintaining accounts in foreign currencies by foreign citizens not permanently residents in India [vide Notification No. FERA. 3/74 R.B. dated 1-1-1974]. For the purpose of this notification : (a) a person of Indian origin shall be presumed to be a person permanently resident in India if he has come to and stays in India otherwise

than for the performance of his duties under a contract of employment of a specified duration or for carrying out any other specific job or assignment the duration of which does not extend beyond the period of 3 years; (b) a person shall be deemed to be a person of Indian origin if he or his parents or any of his grand parents was born in undivided India and the expression "undivided" shall have the meaning assigned to it under Section 2(h) of the Citizenship Act, 1955; (c) a wife of an Indian citizen or a person of Indian origin shall be deemed to be a person of Indian origin, even though she is a foreign citizen of non-Indian origin [vide Notification No. FERA.51/79 R.B. dated 21-5-1979]; the Reserve Bank has granted permission for payment out of foreign currency accounts by foreign citizen not permanently resident in India vide Notification No. FERA. 5/74 R.B. dated 1-1-1974 and the Explanations added to the said notification which are the same as the Notification No. FERA. 51/79 R.B. dated 21-5-1979 stated above [vide Notification No. FERA. 52/79 R.B. dated 21-5-1979]; the Reserve Bank has granted permission for acquiring, holding or disposing of any foreign security by any foreign citizen in or resident in India but no permanently resident therein if such security is acquired by him as his own property or is held by him for or on behalf of any foreign citizen not permanently resident therein [vide Notification No. FERA 12/74 R.B. dated 1-1-1974 adn also the Explanation to the said notification issued under Notification No. FERA. 53/79 R.B. dated 21-5-1979 which is exactly on the same line as stated above] ; the Reserue Bank has granted permission for settlement or gift of any property outside India by any foreign citizen resident in India but not permanently resident therein and the Explanation to this Notification, issued under Notification No. FERA. 54/79 R.B. dated 21-5-1979 which is exactly on the same line as mentioned above]. Whether or not a person who is resident in India under Section 2 (p) is also a permanent resident in India is not determinable with reference to that Section. According to the explanation imputed by the Reserve Bank to the expression "person permanently resident in India", a person of Indian origin who has come to or stays in India otherwise than for the performance of his duties under a contract of employment of a specified duration or for carrying out any other specification or assignment the duration of which does not extend beyond a period of 3 yeers. A person is presumed to have Indian origin if he or either of his parents was born in undivided India as defined under Section 2 (h) of tne Citizenship Act, 1955. According to that Section 'undivided India' means India as defined in the Government of India Act, 1935 as originally enacted. A wife of an Indian citizen or a person of Indian origin is deemed to be of an Indian origin even if she is in fact a foreign citizen of non-Indian origin.

The question as regards "permanent resident in India" ordinarily arises in the case of foreign citizen who becomes resident of India as per Section 2(p). but who in the opinion of the Reserve Bank, is required to be given a treatment different from the one meted out to a person permanently resident in India. Inasmuch as the concept of "permanent resident" is outside the purview of Section 2(p), there is no inconsistency between Section 2(p) and the meaning assigned to the expression "persons permanently resident in India" by the Reserve Bank. But before the question whether a foreign citizen is permanently resident in India arises, he must first be a resident in India.

Mode of remittance : In terms of Section 9(3), any remittance into India from abroad can be made only through an authorised dealer unless a general or special permission to the contrary is taken from the Reserve Bank. In terms of the press Notification dated 21-9-1977 issued by the Reserve Bank of India vide their Press Release No. 50/1977-78 dated September 21, 1977, persons who receive any payment

in India from a non-resident shall ensure corresponding inward remittance from outside India; otherwise they will not be deemed to have received such payment through an authorised dealer. "The Reserve Bank has advised the banks authorised to deal in foreign exchange that, with immediate effect, they should ensure, before making remittances in foreign exchange or transfers of rupees to non-resident bank accounts, that the counter-part rupee payment is made by the remitter only by debit to his account with the remitting bank or by a crossed cheque on his own bank, if the remittance/transfer is for a sum equivalent of Rs. 1,000 and above. This restriction is applicable irrespective of whether the remittances/transfers are made by authorised dealers under the authority delegated to them by the Reserve Bank or against specific exchange permits (except blanket exchange permits) issued by the Reserve Bank. In the case of blanket exchange permits, however, payments must be received from the permitholders in the above manner irrespective of the amount involved. Hitherto, the restriction on cash payments was applicable to remittances/transfers for values of Rs. 50,000 and above made against permits issued by the Reserve Bank." It has been held [in the case of *Director. Enforcement Directorate. Government of India and Others* v. *Saroj Kumar Bhottka (1978) 48 Comp. Cas. 649 = AIR 1978 Cal. 65*] that the Reserve Bank may levy, while according permission under Section 9 of the 1973 Act [corresponding to Section 5 of the 1947 Act], such condition as it may deem fit and proper to levy. However, such conditions shall have a rational connection with the underlying object of the Act, in the absence of such a rational nexus, such conditions would be *ultra vires* the powers of the Reserve Bank and hence invalid.

Section 9(2) accepts the validity of payments and exempts 3 types of payments from the prohibition, imposed by Section 9(1). These exempted types of payments are :

(i) Payments already authorised either with foreign exchange obtained from an authorised dealer or a money-changer under Section 8; or

(ii) Payments made with foreign exchange retained by a person in pursuance of an authorisation granted by the Reserve Bank; and

(iii) Making of any payment with foreign exchange received by way of salary or payment for services (not arising from business in or anything done while in India).

Apart from the aforesaid 3 types of statutory exceptions the Reserve Bank have made general exemptions under Section 9. Some of which are as under :

(A) "Payment to, or for the benefit of, any person resident outside India, out of funds held in an account expressed for foreign currency and maintained by a foreign citizen in or resident in India but not permanently resident therein (FERA. Notification No. 5/74-R.B. dated May 21, 1979 supra).

(B) "Payment in rupees by order or on behalf of a person resident outside India out of rupee funds provided by sale of foreign exchange, by such person, to an authorised dealer in India" (FERA. Notification No. 6/74 R.B. dated 1st January, 1974).

(C) "Any transaction entered into in Indian rupees by or with—(i) Indian, Nepalese or Bhutani resident in Nepal & Bhutan; (ii) a branch situated in Nepal or Bhutan of any business carried on by a company or a corporation incorporated or established under any law in force in India, Nepal or Bhutan; (iii) a branch situated in Nepal or Bhutan or any business carried on as a partnership firm or otherwise by Indians, Nepalese or Bhutanis" (FERA. Notification No. 7/74/- R.B. dated 1st January, 1974).

(D) Receipt of any payment by order or on behalf of a person resident outside India—"(a) made in rupees during such person's stay in India out of the rupee funds provided by sale by such person, of foreign exchange to an authorised dealer in India; (aa) made in rupees representing income from immoyable property held in India, by a non-resident provided that the rupees are credited within 2 months from the date of receipt of such income to the account of the non-resident with an authorised dealar in foreign exchange in India and provided that such properties are held in accordance with Section 31 of the said Act, where applicable; (b) by means of postal order issued by a post office outside India or by a postal money order issued by such post office; (c) by means of cheques drawn on banks situated outside India or bank drafts or travellers' cheques issued outside India; (d) any foreign currency notes received by him directly out of India, subject to the condition that any foreign exchange received shall, within 7 days of receipt of the same be offered for sale or caused to be offered for sale in accordance with the Central Government's Notification No. GSR. 89-F. 1/3/EC/73 dated 15th June, 1977" (FERA Notification No. 48/77-R.B. dated 24th November, 1977 as amended up to May 30, 1979).

(E) "The provision of [sub-section (3) of Section 9] shall not be deemed to apply to the sending, or, as the case may be, bringing into India, in accordance with the Notification of the Reserve Bank No.FERA.9/74-R.B dated lst January, 1974, —(i) foreign exchange (other than currency notes, bank notes and travellers' cheque); or (ii) the bank notes or currency notes (expressed in Indian repees), referred to in that Notification" [vide FERA Notification No.8/74 dated lst January, 1974].

Blocked Accounts (Section 10): This section provides for payment of certain sums to a blocked account. According to sub-section (3), "blocked account" means an account opened, whether before or after the commencement of this Act, as a blocked account at any office or branch in India of a Bank authorised in this behalf by the Reserve Bank, or an account blocked, whether before or after such commencement, by order of the Reserve Bank.

Under sub-section (1) the Reserve Bank has the power to grant an exemption from the provisions of Section 9 in respect of payment of any sum of money to any person resident outside India and the exemption is made subject to the condition that the payment is made to a blocked account. If the Reserve Bank so exercises the power then : (a) the payment shall be made to a blocked account in the name of that person in such manner as the Reserve Bank may by general or special order direct; (b) the crediting of that sum to that account shall to the extent of the sum credited, be a good discharge to the person making the payment. It may thus be noted that the Reserve Bank is vested with the power to "block" accounts in India of any person resident outside India and to direct that any payment due to such person may be made to such blocked account and the payment will be an effective discharge for the person making such payment. It may also be noted that blocked accounts can also be opened in the joint names of a non-resident and a resident in India; but in no case it would be opened in the sole name of an Indian resident.

Under sub-section (2) any sums standing to the credit of a blocked account shall not be drawn on except in accordance with any general or special permission which may be granted conditionally or otherwise by the Reserve Bank.

Special Accounts (Section 12) : This section authorises the Central Government to issue directions for making of certain payments into a special account to be maintained for the purpose by the Reserve Bank or by an authorised dealer specially

authorised by the Reserve Bank in this behalf and provides that payment into special account will give effective discharge to the person making the payment. This section has been enacted in support of Section 10 which speaks of blocked accounts. This section similarly speaks of other special accounts. Section 12 is an enabling section. According to sub-section (1), where payments due to persons resident in any territory is required to be regulated, the Central Government may, by Notification in the Official Gazette, direct that such payments or any class of such payments should be made only into a special account to be maintained by the Reserve Bank or any authorised dealer specially authorised by the Reserve Bank.

Under sub-section (2) such payment into special account will be a good discharge to the person making the payment. According to the proviso to this sub-section, where liability is to make the payment in foreign currency, the extent of discharge will be ascertained by converting the amount paid into that currency at the prevailing rate of exchange.

Sub-section (3) prescribes as to how the funds in the special account shall be dealt with. It says: (a) that where any agreement is entered into between the Central Government and the Government of the territory in which the payment is to be made, the payment in such territory will be made in the manner in which the Reserve Bank will interpret the said agreement; (b) that where no such agreement is entered into, the sums standing to the credit of any special account will be applied for the purpose of paying, wholly or partly and in such order of preference and at such times as the Central Government may direct, debts due from the persons resident in the notified territory to persons resident in India or in such other territories as the Central Government may by order specify in this behalf.

Non-resident (External) Accounts Rules, 1970: At present, an Indian who is resident abroad is permitted to open a *Non-Resident (External) Account* by remitting funds from abroad through banking channels. On his return to India, the account has to be converted into a resident account. The rupee funds in the account are not allowed to be sent abroad.

As the balance in the account as on the date of conversion represents the net amount of foreign exchange brought in by the account-holder, the Reserve Bank permits, depending on the merits of each case—(i) reconversion of such balance into foreign currency when the account-holder leaves India within five years, or (ii) reconversion of the account into a Non-Resident (External) Account after the person's departure from India within five years provided no local rupee credits have been made into the account in the meantime, or (iii) opening of a fresh Non-resident (External) Account after his departure from India within five yerars upto the value limit of the balance as at the time of initial coversion of the account into a resident account. In fact, the reconversion facilities are available up to the amount of balance in the Non-Resident (External) Account at the time of the account-holder's return to India. Applications for availing any of these facilities are required to be made within three months of the account holder's return to India through the authorised dealer in foreign exchange with whom the account is maintained, to the office of the Reserve Bank's Exchange Contol Department under whose jurisdiction the authorised dealer's office functions. The Reserve Bank will grant premission on the merits of each case. The Reserve Bank considers grant of reasonable exchange facilities in deserving cases on compassionate grounds to people who have returned from abroad, due to death of spouse, unsuitability of climate conditions, etc., even if the period after return to India has exceeded five years. Indians who are in

employment abroad with any Indian-owned organisation who maintain Non Resident (External) Account are not, however, eligible for the aforesaid facilities. (Vide Press Note dated 15.9.1975 and Press Note dated 5.10.1979). The Central Government has made Non-Resident (External) Accounts Rules, 1970, under Section 27 of the Act of 1947, for regulating the opening and maintenance of accounts by persons resident outside India. These rules still continue to be in force. Any person resident outside India can open a Non-resident (External) Account by making an application to an authorised dealer. Even an existing account can be converted into a Non-resident (External) Account. The National Defence Remittance Scheme Special Account will not, however, be so converted. The Rules specify the amounts which can be credited to a Non-resident (External) Account. In respect to certain amounts specified in rule 5, the permission of the Reserve Bank is required to be obtained.

Earlier these accounts could be opened only in rupees. A new scheme was, however, introduced subsequently with effect form 1st November, 1975 permitting the authorised dealers to open Non-resident (External) Accounts in designated foreign currencies in the names of persons resident outside India. These accounts are called *Foreign Currency (Non-Resident) Accounts.*

The foreign currency accounts are maintained in the currencies in which the remittances are received and the funds are also repayable to the account-holder, or elsewhere under his instructions, in the same currency, without reference to the Reserve Bank. The interest is payable on the balance held in the account is entirely free of income-tax. Exchange risk in respect of both the funds remitted to India by account holders and the interest accruing on the funds is not borne by the non-resident depositors. To start with, the accounts are maintained in the form of fixed deposits for periods of 91 days and above but not exceeding 61 months. The interest payable on the balances in these accounts will be at such rates as the Reserve Bank may prescribe from time to time (vide Press Note dated 11. 10. 1975). The Reserve Bank purchases pounds sterling and U. S. dollars received by authorised dealers in foreign exchange in India under the scheme of Opening Foreign Currency Non-resident (External) Accounts in India by Indians and aliens of Indian origin resident abroad. Purchases are made for spot delivery at the Branches of the Reserve Bank's Banking Department at Bombay, Calcutta, Madras, New Delhi, Bangalore, Kanpur and Nagpur at notional rates as may be prescribed from time to time. (vide Press Note dated 25. 10. 1975).

Any other rupees account maintained with authorised dealers by persons resident outside India are called *Ordinary Non-resident Accounts.* These accounts do not include Blocked Accounts. The Reserve Bank of India has been issuing directions from time in respect to the aforesaid three types of non-resident accounts. [The readers interested in having further details in this matter are advised to contact any authorised dealer].

Some of the advantages of opening a Non-resident (External) Account (both in rupees and designated foreign currencies) are, in brief, as under:

1. Any income from interest on moneys standing to the credit of Non-resident (External) Accounts is exempted from income-tax under Section 10 (4 A) of the Income-tax Act, 1961.

2. Balances held in Non-resident (External) Accounts are exempt from wealth tax under Section 6 (ii) of the Wealth-tax Act, 1957. Such balances

if gifted, are also exempt from gift-tax under Section 5 (1) (iii) of the Gift Tax Act, 1958.

3. Balances held in Non-resident (External) Accounts along with interest thereon are permitted to be repatriated outside India at any time without prior approval from the Reserve Bank of India. Third country transfers are, however, not permitted in case of Non-resident (External) Rupees Accounts held by persons in bilateral group countries.

4. Balances held in Non-resident (External) Accounts are permitted to be freely invested, without the prior approval of the Reserve Bank, in units of the Unit Trust of India, National/Plan Saving Certificate and Securities of the Central or any other State Governments.

5. Certain loan/overdraft facilities to Non-resident (External) Account holders in and outside India are given in accordance with the directions given by the Reserve Bank of India.

6. Booking of passage can be made by Airline/Shipping companies of travel agents without prior approval of the Reserve Bank if the passage fares are paid from out of Non-resident (External) Accounts subject to certain conditions.

7. Funds are held in Non-resident (External) Accounts (in rupees and designated currencies) are freely transferable *inter se*.

Power of Central Government to direct payment in foreign currency in certain cases (Section 15) :

The Central Government, by this section, has assumed power to direct, by notification in the Official Gazette, that foreign (non-resident) tourists must make certain payments for goods and services in foreign exchange only or in a particular type of foreign exchange. A corresponding responsibility has also been placed by sub Section (2) on the Indian supplier to accept payment in such foreign currency only. By virtue of sub-section (3), the Central Government may, if it is of the opinion that it is necessary or expedient in the public interest so to do, by notification in the Official Gazette, exempt any person or class of persons from the operation of such a notification referred to in sub-section (1).

The opening phrase in sub-section (1), "notwithstanding anything contained in the Indian Coinage Act, 1906 or in the Reserve Bank of India Act, 1934, or in any other law for the time being in force" signifies that Section 15 overrides any other law for the time being in force.

"In this connection, it may be mentioned for information that although the Government of India have taken powers under Foreign Exchange Regulation Act, 1973, to direct that, non-residents who are on a visit to India may make payments only in specified foreign currency for discharging specified liabilities (vide Section 15), they have not so far issued a notification for the purpose of giving effect to the statutory provision. Therefore, hotels are still governed by the administrative instructions issued by the Department of Tourism, in terms of which they are prohibited from accepting payments in rupees against their bills from non-resident foreigners and Indians during their visits to India except in case of a few specified categories of persons". [Vide letter No. CO. 151/P&C—45-76 dated April 5, 1976, issued by the Reserve Bank of India in reply to a query raised by Madras Chamber of Commerce and Industry vide letter No. 1114 dated March 4, 1975].

Duty of persons entitled to receive foreign exchange., etc. (Section) 16 :

This section casts certain obligations on persons who have right to receive any foreign exchange or have a right to receive, from persons outside India, payment in rupees. Such persons are required not to do or refrain from doing anything which may delay or stop receipt of such foreign exchange or payment, except with the general or special permission of the Reserve Bank. In other words, no person who has the right to receive any foreign exchange or to receive from a person resident outside India a payment in rupees should do or refrain from doing any act whereby the receipt of such payment may be delayed or may cease to be receivable.

By sub-section (2), the Reserve Bank is powered to *issue* directions for securing of such payment to any person and such person may be directed to take such steps as the Reserve Bank may direct.

The intention behind this section is to impose obligation upon every person to see that the foreign exchange earned by him in any manner is receivable in India without any delay; and if delay is caused, the Reserve Bank can intervene in the matter. This section applies to all exports.

Payment for exported goods (Section 18) : Since the main source of foreign exchange earnings of India emanates from exports, the Government of India should naturally be vigilant to ensure that the full foreign exchange value of the goods exported is realised in such a way that the proceeds become available to the Government to meet payments for imports and to strengthen the country's of foreign exchange reserves.

With a view to check against invoice manipulation as also to exercise control over repatriation of sale-proceeds of exported goods, Section 18 casts certain obligations on an exporter in respect of notified goods. When such a Government notification is issued, no one can export any goods unless he fulfils the condition to give a declaration in the prescribed form and true in all material particulars which among others shall disclose: (i) the amount representing the full export value of goods; or (ii) the value which the exporter expects to receive on the sale of goods in the overseas market, if the full export value is not ascertainable at the time of export. The exporter will also be required to affirm the said declaration by stating that the full export value of the goods in all events will be paid within the prescribed period and in the prescribed manner. [Sub-section (1) (a)].

In the case of declaration of the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market, the Central Government may, by notification, specify goods in respect of which the permission of the Reserve Bank will have to be obtained by an exporter for authorising, permitting or allowing the sale of such goods for a value less than its declared value. [Sub-section (1) (b)]. According to Notification No. F. 1(67)-EC/73 dated April 4, 1975, issued by the Government of India, Ministry of Finance (Department of Economic Affairs), "precious stones and semi-precious stones other than diamonds" have been specified as goods in respect of which such a permission of the Reserve Bank would be necessary.

According to the second proviso to sub-section (1) (b), in the event of an application for permission as aforesaid being made and no reply thereto being received within 20 days from the Reserve Bank, the permission will be presumed to

have been granted. According to the first proviso, prior to the refusal of the permission by the Reserve Bank, the applicant shall have to be afforded a reasonable opportunity for making a representation in the matter. The Explanation to sub-section (1) (b) provides that in the matter of computation of the aforesaid period of 20 days, the period taken by the Reserve Bank for affording an opportunity to the exporter has to be excluded.

Through the Notification No. F. 1/67/EC/73-2 dated 1st January, 1974 issued by the Government of India, Ministry of Finance (Department of Economic Affairs), "the Central Government hereby prohibits the export, *by post*, of all goods, either directly or indirectly to any place outside India, other than Nepal and Bhutan, unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing—the full export value of the goods, or if the full value of the goods is not ascertainable at the time of export, the value of which the exporter, having regard to the prevalent market conditions, expects to receive on the sale of the goods in the overseas market, and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner : provided that this prohibition shall not apply—(a) where the postal packet is covered by a certificate issued by an authorised dealer that the the export of the parcel does not involve any transaction in foreign exchange ; (b) where the postal packet is accompanied by a declaration by the sender the contents of the parcel are less than fifty rupees in value ; that the despatch of the parcel does not involve any transaction in foreign exchange ; (c) to goods the export of which in the opinion of the Reserve Bank does not involve any transaction in foreign exchange and which the Reserve Bank has, by a special or general order, permitted to be exported without furnishing a declaration as provided for herein".

In the case of *export of goods otherwise than by post*, the prohibition mentioned above does not apply to the following cases [vide Notification No.F. 1/67/EC/73-1 dated January 1, 1974 issued by the Government of India, Ministry of Finance (Department of Economic Affairs). These cases are as follows : (i) trade samples free of payment ; (ii) personal effects of travellers, whether accompanied or unaccompanied ; (iii) ships' stores, transhipment of cargo and goods shipped under the orders of the Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements ; (iv) goods despatched by air freight and accompanied by a declaration by the sender that they are less than Rs. 50/-in value and that their despatch does not involve any transaction in foreign exchange : (v) goods despatchd by air freight and covered by a certificate issued by an authorised dealer that their export does not involve any transaction in foreign exchange ; (vi) goods the export of which in the opinion of the Reserve Bank does not involve any transaction in foreign exchange, and which the Reserve Bank has, by a general or special order, permitted to be exported without furnishing a declaration as aforesaid.

The procedural requirements in relation to Section 18 are contained in the Foreign Exchange Regulation Rules, 1974. According to Rule 4, an exporter has to make an application, in duplicate, in Form C.N.X. specified in the First Schedule, to the Reserve Bank. On receipt of such application, the Reserve Bank shall allot to the exporter a code number. Whenever required by an officer of the Customs, the

exporter is obliged to produce for their inspection the communication of the Reserve Bank allotting the code number. Under Rule 5, a declaration under Section 18 shall be in one of the forms set out in the Second Schedule and as specified therein according to the requirements to the case. Declarations shall be executed in sets of such number as communicated on the relevant form.

Under Rule 6, in the case of exports *otherwise than by post*, the original of the declaration has to be furnished to the Collector and all the copies thereof shall also be submitted to him for his verification and authentication. Those copies shall, when returned by the Collector of Customs, be submitted to the authorities and in the manner as specified in the forms. In case of export *by post*, the aforesaid original shall be furnished to the postal authorities and the copies thereof shall be submitted to the authorities and in the manner specified in the forms. The documents pertaining to every export passed by the Customs or the postal authorities shall, within 21 days of the export, be submitted to the authorised dealer mentioned on the relevant declaration form, unless the Reserve Bank authorises otherwise. Under Rule 7, the Reserve Bank, the Customs or postal authorities may call upon the exporter such evidence in support of the declaration to show that the exporter is a person resident in India, and has a place of business in India. The Reserve Bank, the Collector of Customs or the postal authorities may require any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them:

(a) that the destination stated on the declaration is the final place of destination of the goods exported;

(b) that the value stated in the declaration is

(i) the full export value of the goods; or

(ii) where the full export value of the goods is not ascertainable at the time of export the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market;

(c) that the full export value of the goods (whether ascertainable at the time of export or not) has been or will within the prescribed period be paid in the prescribed manner.

GRI and EP Forms shall have to be submitted to the Customs office in triplicate which will retain the original and return the other two copies duly authenticated, to the exporter for submission along with a copy of invoice to the Reserve Bank through an authorised dealer in foreign exchange through whom the payment for the shipment has to be received. The authorised dealer will duly certify these documents and in turn submit the second copy along with a copy of invoice to the Reserve Bank as soon as the documents are sent for collection under the cover of 'R Supplementary Return'. The third copy of the declaration will be retained by the authorised dealer and will be submitted to the Reserve Bank under the cover 'R Supplementary Return' *after the realisation of full export proceeds*. The PP form has to be submitted, *in the case of export of goods by post*, in triplicate to the authorised dealer for his counter signature. The authorised dealer shall retain the second and the third copy of the form and return the original duly signed by him to the exporter. Thereupon, the exporter shall submit the original along with packet to be exported by post to the post office and within 2 days from the day of posting the packet, the exporter should submit all other relevant

documents along with extra copy of invoice to the authorised dealer for negotiation and collection.

For the purpose of exporting jewellery or precious stones, their value should first be ascertained by the customs authorities who will put their seal on the parcel and stamp the invoice. The extra copy of the invoice submitted to the authorised dealer will have been duly stamped by customs authorities.

The parcels of goods should not be consigned by the exporters to the overseas buyers. This is because in that eventuality they would run the risk of losing the value of goods except where they are covered by irrevocable letter of credit. Therefore, the exporter should consign the goods in such cases to the concerned branches of the authorised dealers through whom shipping documents shall be forwarded for collection in order to enable the authorised dealer to instruct the overseas branch to arrange for the issues of delivery order in favour of buyer on payment or acceptance of bill drawn by the shipper. Declaration in Form VP/COD referred to in the Second Schedule to the Foreign Exchange Regulation Rules, 1974, has to be submitted by the exporter to the postal authorities prior to sending goods by post on VP/COD basis to foreigen territories minus Nepal and Bhutan. This form must not be pasted on the parcel because it will be forwarded to the nearest post office of Reserve Bank by the post office through which the goods have been despatched.

The full value of goods is required to be paid within 6 months from the date of export of the goods. But this prescribed period of 6 months is reduced to that for 3 months when the goods are exported to Pakistan or Afghanistan. The Reserve Bank has the discretionary power to extend this period on sufficient and reasonable cause. If the Reserve Bank does not authorise otherwise, the amount representing the full value of goods exported to countries specified in the Third Schedule to the Foreign Exchange Regulation Rules, 1974 has to be paid through an authorised dealer and in the manner specified in that schedule.

The declaration referred to above shall be of true and full value of goods exported. The particulars required to be given under Section 18 (1) in the declaration being not true or correct in all respects, Section 18 would be immediately attracted and it would be construed as violation of the Act [*A. Tosh & Sons Pvt. Ltd. v. Assistant Collector of Customs and Other AIR 1979 Cal. 386 at* P. *392*]. It may be noted that as a result of this present legal position, the previous legal position, under the 1947 Act and all the judicial pronouncements, including Supreme Court's thereon are no longer valid.

Sub-section (6) of Section 18 speaks of the Reserve Bank's power to issue orders where the declared value of the goods does not disclose the full value of the goods. If the Reserve Bank is of this opinion, it may by order direct the person holding the shipping document to retain the possession thereof until the exporter makes the requisite arrangement for the receipt by the Reserve Bank or, as the case may be, the authorised person of full value of the goods exported,

Under sub-section (2), it is an offence to adopt any methods whereby the payment of the exported goods is made otherwise than in the prescribed manner, or whereby the payment of such goods is delayed beyond the prescribed period or to cause delay in the sale of goods where their value could not be ascertained at the time of export but where such goods have been allowed to be exported. The proviso to this sub-section however states that no proceedings in respect of any contravention of this sub-section shall be instituted unles the prescribed period has expired and the payment for the goods representing the full export value has not been made in the prescriped manner and within the prescribed period.

Sub-section (3) provides for a rebuttabele presumption relating to contravention of the provisions of sub-section (2) in cases of delay in the repatriation of sale-proceeds of specified goods exported. In other words, where the payment of the exported goods has not been received within the prescribed time, the exporter is presumed to have not taken all reasonable steps to receive or recover the payment for the goods and may be prosecuted for the same unless he proves it otherwise. In such a case, the Reserve Bank is further empowered to issue such directions as it may deem expedient for securing the payment of exported goods, including exhibition of contracts with foreign buyer or other evidence in order to show that the full payment either has been received or will be received within the prescribed time [sub-section (4) read with sub-section (7)]. If, pursuant to such directions, the right to receive payment is transferred or assigned to any other in accordance with sub-section(4), then the sale-proceeds will be paid to the exporter after making necessary deductions on account of expenditure incurred by the Central Government in selling goods or in recovering or realising the amount in respect of such goods [sub-section (5)].

Sub-section (8) lays down that where the Reserve Bank has permitted any authorised dealer to accept negotiation or collection of any shipping document covering exports from his constituent (other than the exporter), such authorised dealer shall, before accepting such documents for negotiation or collection, require the constituent concerned also to sign such declaration. Upon such constituent being required to sign the declaration, he (i.e. such constituent) shall be bound to comply with such requisition and thereafter both original declarant and the constituent signing the declaration shall each be considered to be the exporter for the purpose of Section 18 and they shall be governed by all the provisions of Section 18.

Sub-section (9) authorises the Reserve Bank to issue general or special orders from time to time to ensure the receipt of the full export value of the goods in proper time and without any delay. It, therefore, provides that in order to ensure the receipt of full export value of the exported goods in time or without any delay, the Reserve Bank has the power to order, in respect of export of goods to any destination or any class of export transactions or any class of goods or any class of exporters that the exporter shall prior to the export of the goods, comply with any or all the following conditions as may be specified in the order, *viz.*, (a) that any contract or other arrangement for the sale of the goods shall be registered in such manner and with such authority or organisation or as may be specified in the order; (b) that the payment for the goods is covered by irrevocable letter of credit or by such other arrangement as may be specified in the order: (c) that a copy of the declaration [to be furnished to the prescribed authority under sub-section (1)] shall be submitted to such authority or organisation as may be specified in the order for certifying that the value of the goods specified in such declaration represents proper value thereof; (d) that any declaration [to be furnished to the prescribed authority under sub-section (1)] shall be submitted to the Reserve Bank for its approval which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as the Reserve Bank may deem fit to impose. As regards this approval, it is further stipulated that no approval shall be withheld by the Reserve Bank unless the exporter has been given a reasonable opportunity for making a representation in the matter.

Under sub-section (10), the Central Government is empowered to prohibit export of any goods or class of goods or export by specified class of exporters or to specified destination, if it is necessary so to prohibit in view of the prevailing practices

in respect of such goods, or class of goods, or such exporters or destination which have or are likely to have the effect of payment of full export value not being duly received.

Restrictions on import and export of certain currency bullion (Section 13) :

Under sub-section (1), if the Central Government, by notification, declares that no person shall bring or send into India any gold or silver or any foreign currency or any Indian currency without the general or special permission of the Reserve Bank, then no person can bring or send into India such article without such permission. It may be noted in this connection that if the article referred to in sub-section (1) is intended to be taken out of India without being removed from the ship or conveyance in which it is being carried, it will nevertheless be deemed to be a bringing or as the case may be, sending into India of that article.

Sub-section (2) imposes a direct restriction and states that that person shall not take or send out into India any gold, jewellery, precious stones, Indian currency or foreign exchange unless permitted by the Reserve Bank generally or specially.

It may be recapitulated here that the definition of 'gold' as contained in Section 2(j) as also of silver as contained in Section 2(v) are inclusive definitions.

In exercise of the powers conferred under Section 13 (corresponding to Section 8 of the 1947 Act), the Central Government has prohibited except, with general or special permission of the Reserve Bonk the import and/or export of the following :

A. Notification No. 12 (20)E-F VII/51 dated 24th March, 1951 as amended up to February 8, 1957 provides that "the Central Government hereby directs that except with the general or special permission of the Reserve Bank of India no person shall bring or send into India any silver coin which is current in Nepal. Thus, the import of such coins needs general or special permission of the Reserve Bank.

B. Similarly, according to Notification No. 12 (II) F. 1/48 dated August 25 1948 as amended up to July 31, 1958, the import of the article needs general or special permission of the Reserve Bank, *viz.*, (i) any gold coin, gold bullion, gold sheets, gold ingot, whether refined or not ; or (ii) any silver sheets or plates which have undergone no process of manufacture subsequent to rolling, or any silver coin not current in the country of issue ; and jewellery or articles made wholly or mainly of gold or of silver. In other words, the import of these articles require general or special permission of the Reserve Bank. It may be noted in this connection that the Central Government, through its Order No. 5/5/78 C.I.F. (1) dated August 17 1978, has ordered "that the State Bank of India, constituted under the State Bank of India Act, 1955 (23 of 1955), may import into India any gold for the purposes of Gold Jewellery Export Replenishment Scheme, notified by the Government of India in the Ministry of Commerce, Civil Supplies and Cooperation and the Public Notice No. 59-ITC (PN)/78 dated August 17, 1978".

C. Through Notification No. F. 1/107/EC/73 dated 1st January, 1984, the Central Government has directed "that except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place outside India—(i) any Indian coins ; (ii) currency notes of the Government of India or the Reserve Bank of India notes ; (iii) any foreign exchange other than foreign coins".

"In pursuance of sub-section (2) of Section 13 of the Foreign Exchange Regulation Act, 1973 (46 of 1973), the Reserve Bank hereby authorises——— (1) the

Chief Controller of Imports & Exports, (2) Additional Chief Controller of Imports & Exports, (3) Jt. Chief Controller of Imports & Exports, (4) Dy. Chief Controller of Imports & Exports (5) Controller of Imports & Exports to grant export licence under that sub-section to send out of India (i.e. to export) jewellery made out of gold in accordance with the Gold Jewellery Export Replenishment Scheme, notified by the Government of India, Ministry of Commerce, Civil Supplies and Cooperation, (vide Order No. E.C.C.P. & CO 4/104-78 dated 17th August, 1978).

Section 17 is an enabling section which empowers the Central Government to impose such conditions, as it thinks necessary or expedient on the (i) use, or (ii) disposal of, or (iii) dealings in gold and silver. The conditions may be imposed only prior to or at the time of import of these articles. The conditions can only be imposed by notification in the Official Gazette. It is interesting to note that although for import of gold, general or special permission of the Reserve Bank is required, the Reserve Bank is not authorised to lay down any conditions upon its use after the import. This power is retained by the Central Government.

In terms of Rule 10 of the Foreign Exchange Regulation Rules, 1974, if any person desires to have permission to take or send out of India any jewellery or precious stones or both he shall make an application in that behalf to the Reserve Bank or to a person authorised by it under Section 13(2) of the Act in Form 'J'-1' as the case may be as specified in the Fourth Schedule.

It will be noticed from the Fourth Schedule that application in Form 'J' has to contain the description of the article, present market value thereof, the way in which and the date on which and the place where it was required. From the notes in Form 'J' it would be apparent that the application may be accompanied by a certificate from an established jeweller in support of the weight and the present market value of the articles of jewellery and precious stones listed in this application. The article will, however, be valued independently by the jewellery appraiser of Customs. Further, the permit, when issued by the Reserve Bank, has to be produced to the jewellery appraiser of Customs in the Customs House at the port of embarkation (or at any other centre where there are arrangements for valuation of jewellery), along with the articles of jewellery and precious stones mentioned in the permit, for verification of their valuation and issue of the necessary Customs Export Certificate Form 'J' necessitates the giving of the description of the jewellery or precious stones, percentage of gold used, country from which the gold was originally imported for making them jewellery and its present market value.

The Reserve Bank has actually accorded permission for import of or, as the case may be export of the following currency bullion etc., namely—

I. Import of (silver coins current in Nepal) Nepalese Rs. 20 at any one time. [vide Notification No. FERA. 123/54-R.B. dated 4th January, 1954 as amended up to 10th May, 1957.]

II. Under Notification No. FERA. 208/62-R.B. dated 8th November, 1962, "the bringing or sending of any of the following articles, namely—

(a) any gold coin, gold bullion, sheets or gold ingot, whether refined or not, or

(b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling or any silver coin not current in the country of issue, or

(c) any jewellery or articles made wholly or mainly of gold or silver,

into any port or place in India when such article is on through transit to a place which is outside the territory of India : provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment : provided further that it is declared in the manifest for transit as ship bottom cargo or transhipment cargo". The implication of these two provisos is that the exemption is subject to the conditions comprised therein.

III. Import "of Spinnerettes made mainly of gold by sea or by air into India, provided that an import licence has been obtained by the importer from the Import Trade Controlling Authority concerned". (Notification No. FERA. 223/63-R.B. dated 4th July, 1983.)

IV. The export "of Indian currency in the form of Gandhi Coin of denomination of Rs. 10, Re.1, 50 paise, and 20 paise : Provided that the number of coins of each denomination sent or taken out of India at any one time does not exceed five : Provided also that not more than two out of the five coins referred to in the first proviso shall be 'proof coins': Provided further that where the coins are being sent out of India, the person sending out furnishes to the authority specified in this behalf by the Reserve Bank, a declaration in writing that the number and kind of coins sent out are in conformity with the requirements of this notification. Explanation: for the purpose of this notification—(a) 'Gandhi coin' means coin a bearing the effigy of Mahatma Gandhi, and (b)"proof coin." means a coin issued by the Mint as a "proof coin." (Notification No. FERA. 247/69-R.B. dated 10th December, 1969.) This exemption is also subject to the conditions mentioned in the provisos.

V. The import of personal jewellery by a traveller "made wholly or mainly of gold or of silver, which is worn on his person or which forms part of his effects or personal baggage, provided that the value of such jewellery does not exceed the limits, if any, applicable to such person specified in the rules made by the Central Government under Section 79 of the Customs Act, 1962, for import free of customs duty or the value of which being in excess of the above said limits, is passed by the Customs Authorities on payment of customs duty prescribed by law". [Notification No. FERA. 255/72-R. B. dated 7th June, 1972.]

VI. Import of foreign exchange and Indian currency. Through its Notification No. FERA. 9/74-R.B. dated 1st January, 1974, the Reserve Bank has permitted any person—

"(i) to send into India—(a) Special Bank Notes issued by the Reserve Bank under Section 28A of Reserve Bank of India Act, 1934 (2 of 1934), and referred to in Regulation 4 of the Reserve Bank of India (Special Bank Notes and One Rupee Notes,) Regulations, 1959 as Special Haj notes, without limit from Saudi Arabia; (b) foreign exchange other than currency notes, bank notes and travellers' cheques;

(ii) to bring into India——(a) from Nepal, currency notes of the Government of India and Reserve Bank notes of 'Ashoka Pillar' design (other than notes of denomination of Rs. 100 or higher and Special Bank Notes and Special One Rupee Notes issued under Section 28A of the Reserve Bank of India Act, 1934 (2 of 1934) up to an amount not exceeding Rs. 75/- in all per person at any one time; (b) from Burma, currency notes of the Government of India and Reserve Bank of India notes of 'Ashoka Pillar' design (other than notes of denomination of Rs. 100 or higher and Special Bank Notes and Special One Rupee Notes issued under Section 28A of the Reserve Bank of India Act, 1934 (2 of 1934) up to an amount not exceed-

ing Rs. 50/- in all per person in the case of adults and Rs. 25/- in all per person in the case of persons who have completed 12 years of age but have not yet completed 18 years of age; Provided that the amount sought to be brought into India has been endorsed by the concerned authority in Burma on the passport relating to the person seeking to bring in the same; (c) from any place in Saudi Arabia, Special Bank Notes, the sending in of which is permitted under sub-clause (a) of clause (i) above without limit;

(iii) to bring into India from any place outside India without any limit foreign exchange (other than unissued notes): Provided that the permission contained in this notification to bring foreign exchange into India shall be available to any such person only if he makes, on arrival in India, a declaration to the customs authorities (i.e. Currency Declaration Form—'CDF') in such form as may be specified by the Reserve Bank in this behalf, of the particulars of all such foreign exchange brought in by him: Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange brought in by the said person in the form of currency notes, bank notes or travellers' cheques at any one time does not exceed US $ 1000 (One thousand dollars) or their equivalent".

VII. Export of foreign exchange and Indian currency. Through Notification No. FERA.10/74, dated 1st January, 1974, "the Reserve Bank is pleased:

(1) to permit any person to take or send out of India to Nepal currency notes of Government of India, Reserve Bank of India notes (excluding in either case notes of the denominations of Rs.100 or higher) and Indian coin or other notes or coin which are the currency of Nepal;

(2) to permit currency in the safes of vessels or aircraft which has been brought into India or which has been taken on board a vessel or an aircraft with the permission of the Reserve Bank to be taken out of India;

(3) to permit a dock passenger to Burma, Malaya, Singapore, a Persian Gulf Port or East Africa, or a passenger to Ceylon or Pakistan, to take with him Indian currency in the form of currency notes of the Government of India or Reserve Bank of India notes or Indian coin or foreign currency in the form of currency notes and coins obtained from an authorised dealer or money-changer or partly in such Indian currency and partly in such foreign exchange, not exceeding in all Rs. 30/- in value at any one time, provided that the amount of Indian currency does not exceed Rs. 20/;

(3A) to permit a passenger to Bangladesh, to take with him Indian currency in the form of currency notes of the Government of India or Reserve Bank of India notes or Indian coins or foreign currency, in the form of currency notes and coins obtained from an authorised dealer or money-changer, or partly in such Indian currency and partly in such foreign currency, not exceeding in all Rs. 20/- in value at any one time;

(4) to permit any person in India but not resident therein to take out of India any amount—(a) of foreign exchange not exceeding the amount brought in by him in foreign exchange, and (b) of Special Bank Notes and Special One Rupee Notes issued under Section 28A of the Reserve Bank of India Act, 1934, not exceeding the amount brought in by him in either or both the notes: Provided that he makes, on arrival in India, a declaration to the customs authorities, in such form as may be specified by the Reserve Bank in this behalf, of the amount of foreign exchange or as the case may be such special notes brought in by him.

VIII. Export of precious stones and gold jewellery. Through Notification No. FERA. 11/74-R.B. dated 1st January, 1974, "the Reserve Bank —(a) permits any person to despatch by post out of India precious stones or jewellery (without gold content or jewellery the value of gold content of which does not exceed 10% of the value of such jewellery) to the countries or territories specified in the first column of Schedule I to this notification to the extent indicated in the corresponding entries in the second column thereof; (b) permits any person permanently resident in India to take at any one time out of India, except to Pakistan, personal jewellery made mainly or wholly of gold up to Rs. 5,000 in value which is worn on his person or which forms part of his personal baggage; (c) permits any person in India but not resident therein to take out of India, except to Pakistan, jewellery made mainly or wholly of gold without limit provided that the jewellery was previouly brought by him into India from abroad with the permission of the proper officer of customs under the Custom Act, 1962 (52 of 1962), and the rules made or deemed to have been made thereunder; (d) permits any foreign citizen who is not by birth a citizen of India or Pakistan and who is not permanently residing in either of these countries to take at any one time out of India, except to Pakistan, jewellery made mainly or wholly of gold up to Rs. 2,000 in value, provided that such jewellery had been purchased by him in India; (e) permits any person to take at any one time out of India precious stones or jewellery, other than articles made wholly or mainly of gold, to the countries or territories specified in the First column of Schedule II annexed to this notification, to the extent indicated in the corresponding entries in the second column thereof: Provided that any foreign citizen who is not by birth a citizen of India or Pakistan and who is not permanently residing in either of those countries may take out with him any precious stones or jewellery other than articles made mainly or wholly of gold brought by him into India without limit and such stones or jewellery purchased by him in India, up to Rs. 10,000 in value.

IX Export of development oriented design coins—(i) Planned Families—Food For All; (ii) International Women's Year; (iii) Happy Child-Nations' Pride.

In pursuance of Section 13 (2) of the FERA, 1973, the Reserve Bank has permited "any person to take or send out of India for non-commercial purposes currency in the form of Developmant Oriented Design Coins with the inscription of 'Planned families-Food for All' of denominations of Rs.50/-, Rs.10/- and 10 paise:

Provided that the number of coins of each denomination sent out of India for making gifts (i.e. non-commercial purposes) does not at any one time exceed two:

Provided further that in case of passengers desirous of taking out of India for purposes of presentation, the number of coins does not exceed two coins each of denominations of Rs. 50/- and Rs. 10/-:

Provided also that where the coins are being sent out of India, the person sending them out furnishes a declaration in writing that the number and kind of coins sent are in conformity with the requirements of this notification, to——(a) the Customs authorities at the air or sea port, where the coins are sent out by air or sea; (b) the postal authorities, where the coins are despatched by post.

Explanation: for the purposes of the notification, 'Development Oriented Design Coin' means a coin bearing a development oriented design issued to mark the year 1974 as the "World Population Year by the United Nations". (Notification No. FERA. 24/75-R.B. dated 30th January, 1975.)

Similarly, in respect of (ii) and (iii) mentioned above, two more notifications Nos. FERA. 33/75-R.B. dated December 13, 1975 and FERA. 58/80-R.B. dated 16th January, 1980 have been issued by the Reserve Bank in identical terms as Notification No. FERA. 24/75-R B. dated 30th January 1975.

X. Export of cheques, drafts, foreign exchange etc:

In pursuance of Section 13(2), the Reserve Bank, through Notification No. FERA. 36/76-R.B. dated May 10, 1976 as amended up to 28th December, 1978, has permitted.

(a) "the authorised dealers to send out of India foreign currency in the form of coins, currency notes, cheques, drafts or bills of exchange which have acquired in the normal course of their business and within the terms of authorisation;

(b) any person maintaining an account in accordance with the provisions of the notification of the Reserve Bank No. FERA. 3/7-R.B. dated 1st January, 1974, to take or send out of India, cheques, drafts drawn on such account"

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STUDY—IX

FERA, 1973

Securities

—Regulation of export and transfer of securities (Section 19)—Restrictions on payment in respect of certain securities (Section 20)

—Custody of Securities (Section 21)

—Restrictions on issue of bearer securities (Section 22)

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Holding of Immovable Properties Outside India

—Restrictions of such holdings (Section 25)

Aquisitions, Holding etc. of Immovable Property in India

Restrictions on persons resident in India as sociation themselves with or par[illegible] pating in concerns outside India (Section 27)

—Restrictions on the appointment of certain persons and companies [illegible] agents or technical or management advisers in India (Section 28[illegible]

—Restrictions on establishment of place of business in India (Sectio[illegible]

—Restrictions on Settlement (Section 24)

—Certain provisions as to companies (Section 26)

Prescribed reading:

1. Exchange Control Manual—F[illegible]I Publication. [illegible]ia.
2. FERA—Ready Reference—A publication of the Institute of Company Secretaries [illegible]

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SECURITIES

It is needless to say that dealings in securities may entail vital implication in respect of foreign exchange in the sense that they may be a fomidable source of inflow and outflow of foreign exchange. It is imperative to see that Indian residents are not allowed to pile up their foreign exchange stock abroad but repatriate the same to India. It is equally of dire need to ensure that the foreign investment in securities in India is in conformity with the policy of the Government in this regard. With these objectives in view, the 1973 Act has enancted elaborate regulatory provisions in respect to export and transfer of securities. Sections 19 to 23 mainly contain these regulatory provisions.

At this junction, the attention is drawn to the definitions of the expression "security" and "foreign security" contained in Section 2 (u) and (i) discussed in the the Study Paper 8 as well as the definition of the expressions "certificate of title to security" as contained in Section 2 (d) and "bearer certificate" as contained Section 2 (c).

Regulation of export and transfer of securities (Section 19): The very heading of the Section speaks for the enactment thereof. This Section overides the provisions of Section 81 of the Companies Act, 1956. It imposes restrictions on the export of securities to prevent export of capital. The following transactions are prohibited without the general or special permission of the Reserve Bank :

(a) to take or send any security to any place outside India ;

(b) to transfer any security or create or transfer any interest in a security, to or in favour of a person resident outside India ;

(c) to transfer any security from a register in India to a register outside India or to substitute any security in India or registered in India with any security outside India or registered outside India ;

(d) to issue any security to a person resident outside India ;

(e) to acquire, hold, or dispose of any foreign security. In pursuance of Section 19 (1) the R.B.I. has permitted for the purpose of clause (e) above "any foriegn citizen in or resident in India but not permanently resident therein to acquire, hold or dispose of any foriegn security, if such security is acquired by him as his own property or is held by him for or on behalf of any foreign citizen not permanently resident in India" (vide Notification No. FERA 12/74-R.B. dated 1st January, 1974).

Sub-section (2) deals with the case of nominee holder of a security. A person would be a nominee of another when he would be holding security, not in his own right but in the right of someone else who infact has a right to control the acts of the nominee in regard to the disposition of the security. A nominee is not the beneficial owner but merely a *benamidar* i.e., a person giving all the indications of ownership but not being the owner. Such a person must obtain the general or special permission of the Reserve Bank for any act whereby he recognises or gives effect to the substitution of the security in the name of another person. Such permission will be accorded only if both the persons (that is the person instructing the substitution and the person substituted) are immediately before the substitution resident in India and the Reserve Bank thinks fit to grant the permission.

Sub-section (3) provides that the Reserve Bank may, for the purpose of securing that the provisions of Section 19 are not evaded require that the transferor as well as the transferee of any security shall subscribe to a declaration that the transferee is not resident outside India.

Sub-section (4) specifically provides for non-transfer of securities without the permission of the Reserve Bank. Ordinarily, the Companies Act and the provisions of the articles and memorandum of association of a company provide that on a proper instrument of transfer being executed by the parties, the company should register the transfer of shares. If the company wrongfully refuses to register the name of the transferee. the transferee has the right to have his name registered as the holder of particular security or to sue the company.

Sub-section (4) of Section 19 of the FERA, however, provides that notwithstanding anything contained in any other law, no person without the permission of the Reserve Bank can enter any transfer of securities, if he has ground for suspecting that the transfer involves contravention of the provisions of Section 19 (e.g., where the transfer is sought to be made to a person resident outside India). Similarly, in regard to the transfers already entered, a change in the address outside India cannot be made or substituted, without the permission of the Reserve Bank. Also, permission of the Reserve Bank is necessary to transfer any share from a register outside India to a register in India.

Sub-section (5) requires the transfer of shares to be confirmed by the Reserve Bank. Accordingly, the transfer of any share by a company registered in India shall not be valid if such transfer is not confirmed by the Reserve Bank when such transfer is made by a person resident in India or by a national of foreign State, and in such a cases it is immaterial whether such transfer is made to a person resident in India or outside India. This requirement overrides any other law as may be in force for the time being. The application for such confirmation of the transfer may be made by the transferor or transferee, in duplicate in prescribed forms which may be obtained from any office of the Reserve Bank or a bank authorised to deal in foreign exchange in India [Press notes issued by the Reserve Bank, Central Office, Bombay, dated 23rd April, 1975.] The prescribed forms are—(i) Form TS1 for permission to transfer shares of a company registered in India by a person resident

outside India to another non-resident person or a person resident in India : (ii) From TS2 for permission to acquire by a person resident in India shares of a company registered in India held by a person resident outside India ; (iii) Form TS 3 for permission to transfer shares by a company registered in India by a foreign national resident in India.

It may be noted that by virtue of sub-section (6), the Central Government may exempt transfer of shares from the operation of sub-section (5) discussed above. This the Central Government may do in public interest by notification. This exemption may be granted subject to such conditions, if any, as may be specified in the notification.

Sub-section (7) defines the terms, the 'holder', 'nominee' for the purposes of Section 19 thus :

(a) 'holder', in relation to a bearer securities, means the person having physical custody of the security ; provided that, where a bearer security is deposited with any person in a locked or sealed receptacle from which the person with whom it is deposited is not entitled to remove it without the authority of some other person, that other person shall be deemed to be the holder of the security :

(b) 'nominee' means a holder of any security (including bearer security) or any coupon representing dividends or interest who, as respect the exercise of any rights in respect of such security or coupon, is not entitled to exercise those rights except in accordance with the instructions given by some other person. A person holding a security or coupon as a nominee will be deemed to act as nominee for the person who is entitled to give instructions either directly or through the agency of one or more persons, as to the exercise by the holder of the security or coupon of any rights in respect thereof if the person giving such instructions is not himself under a duty to comply with the instructions given by some other person.

The Reserve Bank has clarified that no company in India can issue right shares to non-resident shareholders except with the prior approval of the Reserve Bank nor can any non-resident shareholder renounce/sell the rights in favour of/to persons resident in India or outside India without the Reserve Bank's prior approval, for such action attracts the provisions of Section 19 of the Foreign Exchange Regulation Act, 1973" [Issued by the Reserve Bank Bombay, dated 11th January, 1979].

"Issue and tranfer of securities and shares expressed to be payable in Indian currency to persons resident in Nepal now require the prior approval of the Reserve Bank under the Foreign Exchange Regulation Act, 1973....." [Issued by the Reserve Bank of India, Press Relations Section, Central Office, Bombay, vide their Release No. [illegible] 1976-77 dated 26th February, 1977].

Restrictions on payment in respect of certain securities (Section 20) : The Central Government is empowered by this Section to prohibit, by noti-

fication, the receipt of any payment in India on account of any Government security created or issued for the purpose of raising a public loan before the 15th day of August, 1947 and the principal and/or interest on which is payable in a notified country or place outside India. However, such receipt may be permissible only with the general or special permission of the Reserve Bank. In exercise of the powers confered by Section 13A of the Foreign Exchange Regulation Act, 1947 (corresponding to Section 20 of the FERA 1973), the Central Government has notified "that the holder of any Government security, as defined in the Public Debt Act, 1944 (18 of 1944), created and issued for the purposes of raising public loan before the 15th day of August, 1947 in respect of which principal or interest or both are for the time being" payable in Pakistan, will not be entitled, except with the general or special permission of the Reserve Bank to have any such payment made at any place in India. [Notification No. 3 (15)-E & P/59 dated 23rd February, 1959].

According to the Explanation to Section 20 'holder' shall have the same meaning as stated above under Section 19 (7).

Custody of securities (Section 21) : With a view to ensuring strict compliance of the provisions of Section 19 discussed above, Section 21 empowers the Central Government by notification in the Official Gazette to order every person by whom or on whose behalf a security or certificate of title to a security is held in India to cause such security or certificate of title to be kept in the custody of an authorised depository named in the order. The proviso to sub-section (1) arms the Reserve Bank to pass an order in writing permitting any such security so deposited to be withdrawn from the custody of the authorised depository on such conditions as may be set out in the order.

Whereas sub-section (1) confers power on the Central Government to issue orders directing the compulsory deposit of securities in the custody of an authorised depository, sub-section (2) prohibits persons authorised to accept such deposits of securities from parting with such securities except to other authorised depositories.

Sub-section (3) states that unless a general or special permission of the Reserve Bank is obtained, an authorised depository cannot transfer the securities deposited under sub-section (1) to the name of a person resident outside India, and such authorised depository also should not do any act whereby he substitutes any other person as the beneficial holder of such securities at any place and instead of the original depositor.

Sub-section (4) prohibits the purchase, sale or transfer of any security or certificate of title to a security in respect of which an order under sub-section (1) has been made unless such security or certificate of title is deposited in accordance with the order under sub-section (1).

For the purpose of having effective control and ensuring strict compliance with its order made under sub-section (1), sub-section (5) provides that no capital

monies, interest or dividends in respect of any security covered by an order under sub-section (1) shall be paid except to or to the order of the authorised depository having a lawful custody of the security.

Sub-section (6) defines "authorised depository" as a person notified by the Central Government to be entitled to accept the custody of securities and certificates of title to securities. It also states that 'security' includes coupons.

Thus, it may be remembered that the permission of the Reserve Bank is required to be obtained in relation to any security covered by an order for the purposes of sub-sections (1) to (5).

Restrictions on issue of bearer securities (Section 22): The Central Government may by notification in the Official Gazette order that except with the general or special permission of the Reserve Bank, no person shall, in India, and no person resident in India shall, outside India, create or issue any bearer certificate or coupon or so alter any document that it becomes a bearer certificate or coupon. A notification to this effect has been issued by the Central Government under Section 15 of the 1947 Act (corresponding to Section 22 of 1973 Act) which still continues to be in force. [Notification No. 1 (67) EPI/57 dated 5th December, 1957].

It may be noted that a bearer security is a security which would not require any instruction for transferring it and it can be transferred by mere delivery without any document and the bearer would be ome the owner thereof.

Acquisition by Central Government of foreign securities (Section 23): By virtue of this Section, the Central Government may acquire, by notification, any foreign security with a view to strengthening its foreign exchange position. The Government may do so in two days, viz., (i) by ordering transfer to itself of specified foreign securities to the Government at a specified price; or (ii) by directing the owner of such specified securities to sell the securities and offer the net foreign exchange proceeds of the sale to the Reserve Bank or a person authorised by the Reserve Bank at a specified price. Such specified price may be one which in the opinion of the Central Government, is not less than the market value of the security or, as the case may be, a price which is not less than the price calculated at the prevailing market rate of exchange.

Sub-section (2) enunciates the effects of ordering acquisition of any foreign exchange which would be as under:

(i) The notified securities will forthwith vest in the Central Government free from all encumbrances, e.g., mortgage, pledge or charge;

(ii) The owner of any of the securities to which the notification relates and any person who is responsible for keeping any registers or books in which any of those securities are registered or inscribed or who is otherwise concerned with the registration or inscription of any of those securities,

shall do all such things as are necessary or as the Central Government or the Reserve Bank may order to be done, for purposes of securing that securities and their certificate of title or duly delivered, registered and inscribed in the name, of the Central Government or its nominee;

(iii) No dividends or interest payable on those securities after the date of their acquisition are paid to the Central Government or its nominee;

(iv) Where in the case of any securities payable to bearer which is delivered in pursuance of the said notification, in any coupon representing any such dividends or interest are not delivered with the security such reduction in the price payable therefor shall be made as the Central Government may think fit. However, by virtue of the proviso to this sub-section where the specified price of any notified security is ex-dividend or ex-interest, no reduction in price on account of such dividend or interest shall be made.

Sub-section (3) lays down that once a certificate is issued by a person authorised in this behalf by the Central Government to the effect that any particular securities are transferred to the Central Government, the certificate would be conclusive evidence that the securities are so transferred.

HOLDING OF IMMOVABLE PROPERTY OUTSIDE INDIA

Restrictions of such holding (Section 25): Without the permission of the Reserve Bank, a person resident in India canot acquire, hold, transfer or dispose of, by sale, mortgage, lease, gift, settlement or otherwise, any immovable property situated outside India. However, such permission is not required to be obtained in respect of immovable property acquired or transferred by way of lease for a period not exceeing 5 years. The above provisions are also not applicable to foreign nationals. An application for permission of the Reserve Bank under Section 25 (1) to hold immovable property outside India, will have to be made in Form I.P.A. 1. Each immovable property would necessitate the use of a separate form. If an applicant holds any other immovable property/properties outside India, other than the one declared in any such form, then a list has to be annexed to the application, giving brief description and other details of such properties. Authenticated copy of the purchase deed, lease agreement or such other document (s) relating to the purchase/acquisition of the property declared in application form shoiud also be enclosed.

Sub-section (2) speaks of immovable praperty outside India at the time of the commencement of this Act, held by an Indian resident. Accordingly, such person shall, before the expiry of a period of 3 months from such commencement or such further period as the Reserve Bank may allow in this behalf, declare such holding to the Reserve Bank in Form I.P.A. 2. The Reserve Bank may issue licences for holding the properties subject to the conditions, namely: (a) income from such property would be repatriated to India through an authorised dealer; and (b) prior approval of the Reserve Bank would be obtained for disposing of income from such property

in any manner, for transferring such property by way of sale, mortgage, lease, gift, settlement or otherwise except by way of a lease for a period of less than 5 years.

Sub-section (3) empowers the Central Government to direct any person holding immovable property outside India to sell the whole or any part of it subject to such terms and conditions as it may deem fit. Also, the Central Government may require the proceeds of such sale to be received in India through an authorised dealer. It may be noted that the Central Government may do these things if it is satisfied that it is necessary or expedient in the public interest so to do.

ACQUISITION HOLDING ETC. OF IMMOVABLE PROPERTY IN INDIA

Restrictions of such acquisition etc. (Section 31): It seems that with a view to reducing the scope of drainage of foreign exchange by way of income from immovable property and contingent exchange liability by way of repatriation of capital which would arise from capital appreciation, this Section has been enacted. For the purpose of acquiring or holding or transferring or disposing of by way of lease, gift, supplement or otherwise any immovable property situated in India, the Section makes it obligatory for certain entities to obtain the previous general or special permission of the Reserve Bank. Such entities are : (i) a person who is not a citizen of India, and (ii) no company (other than a banking company) which is not incorporated under any law in force in India, or (iii) no company in which the non-resident interest is more than 40%. But this provision shall not apply to the acquisition or transfer of any such property by way of lease for the period not exceeding 5 years ; that is, any such acquisition for a period of 5 years or less is excluded, from the purview of this provision. According to the Reserve Bank's letter No. EC.Co.FCS. 1027/22-74 dated August 7, 1974 in reply to the queries posed by the ASSOCHEM vide their letter No. EA/18/3094 dated May 7, 1974, "(a) Aquisition of immovable property by way of lease for a period of 5 years would not attract the provisions of Section 31(1) of the Foreign Exchange Regulation Act, 1973. If the lease deed provides for more than one option to renew lease for the same period the renewal would continue to be exempt, as it would not be for a period exceeding 5 years, (b) The provisions of Section 31(1) of the Act are not attracted in the case of monthly tenancies. Immovable properties held on this basis as on 1st January, 1974, should, however, be declared to the Reserve Bank in terms of Section 31(4)."

According to Circular No. 100C/75 dated March 17, 1975 issued by the Madras Chamber of Commerce and Industries dated March 17, 1975, "If the machinery is fixed on the factory premises in such a way that it cannot be removed easily without affecting/destroying the factory or the premises where it is fixed or if the machinery is permanently fastened to anything attached to the earth, it will be regarded as immovable property for the purposes of Section 31 of the FERA 1973 and the company's approval under Section 31 (1) of the Act will be required for the acquisition and replacement of such plant and machinery". In other words, acquisition of property by way of fixture to the immovable property already held

would be within the purview of Section 31 and would, therefore, require the permission of the Reserve Bank. Also, any extensions/additions to the existing workers' quarters are regarded as acquiring frsh property within the meaning of Section 31, as evident from the Reserve Bank's letter No. Co. FCS (iii) /285/1-76 dated January 29, 1976,

According to the clarifiction issued by the Reserve Bank through their letter No. Co,FCS (iii) /714/1-76 dated March 10, 1976, "once the company's application for permission under Section 29 (2) (a) or (1) (a) of the FERA 1973 to carry on its existing business (as on 1st January, 1974)/new activity has been approved by the Reserve Bank of India that company is not required to obtain its specific permission under Section 31 (1) of the Act for acquiring any immovable property (including acquisition of immovable property by way of construction on and/or extensions/ additions to the existing immovable property) which is necessary for/incidental to carrying on its permitted activity, as it can then avail of the benefit of the general permission granted by the Reserve Bank's Notification No. FERA. 2/74-R.B. dated 1st January, 1974. If the concerned company has not been granted approval under Section 29 (2) (a) or Section 29 (1) (a) of the FERA 1973 that company has to obtain Reserve Ban's prior permission under Section 31 (1) of the Act for acquisition of any immovable property including accquisition of immovable property by way of constructions on and/or additions/extensions to the existing immovable property) in India",

In order to acquire or hold immovable property in India, a foreign national or a foreign company or a company in which non-resident interest is more than 40%. has to get the general or special permission of the Reserve Bank under Section 31 by making an application in Form IPI 1. It is necessary to annex to the application authenticated copy of the draft purchase-deed, draft lease, other agreement or such other documentary evidence relating to the acquistion of immovable property in question. To tranfer or dispose of immovable properties situate in India by sale, mortgage, lease, gift, settlement etc it is necessary to apply in Form IPI 2 for permission of the Reserve Bank. A separate form should be used for each immovable property. Authenticated copy of the draft, sale-deed, draft lease agreement or such other documentary evidence relating to the transfer/disposal of the immovable property in question should accompany the application. An application for the permission of the Reserve Bank for the sale of tea/coffee rubber estates situated in India should be submitted in Form IPI 3 along with the particulars to be furnished by the seller in Form IPI 4. Applications in forms IPI 1 and 2 are required to be made in duplicate whereas the application in Form IPI 3 needs to be made in quadruplicate. These should be accompanied by a valuation report in respect of the property in question from an approved valuer appointed by the Government under Wealth-tax Act. The valuation report should be comprehensive and indicate the value of each of the major assets and the mode of valuation applied in determining the value. [Vide Press Note issued by the Reserve Bank of India, Press Relations Section, Central office, Bombay, datey October 5, 1974.]. Application for acquiring, holding,

transferring or disposing of any immovable property in India by foreign companies and foreign citizens are to be made in the aforesaid prescribed forms to the Controller, Exchange Control Department, Reserve Bank of India, Central Office, Bomby. [Vide-Press Note issued by the Reserve Bank of India, Press Relations Section, Central Office, Bombay, dated 1st January, 1975].

In pursuance of Section 31(1) of the Foreign Exchange Regulation Act, 1973, the Reserve Bank has permitted "a compay referred to in that sub-section— (a) to acquire or hold any immovable property situated in India, provided that— (i) such acquisition or holding of immovable property is necessary for or incidental to carrying on by such company of any activity permitted under Section 28 or Section 29 of the said Act ; and (ii) such company files a declaration, not later than 90 days from the date of such acquisition or holding, giving full particulars of the transaction as may be required by the Reserve Bank in that regard ; (b) to transfer, by way of security for any borrowing permitted under sub-section (7) of Section 26 of the Act, any such immovable property so acquired or held.

Provided that the permission granted hereby shall not be available to a company, which has been permitted under Section 29 to open a Liaison office to post a representative in India". [Notification No. FERA 2/47-R.B dated 1st January, 1974 as amended up to March 5, 1979]. According to Clarification No. EC Co. FCS. (iii) 1282/9-79 dated 3rd December, 1979, "it will be in order for a person resident in India to recive a rental income from immovable property belonging to a foreign national residing outside India provided the amount of rentals is credited to the non-resident ordinary account of the holder of the property, maintained with a bank authorised to deal in foreign exchange in India within a period of 2 months and provided that the properties are held in accordance with Section 31 of the Act. A non-resident person can open a non-resident account jointly with a person in India. As regards the rules relating to operations of the nonresident account, authorised dealer may be consulted for seeking proper guidance".

It may be observed from the above-mentioned clarification that a non-resident account can also be opened as a joint account with a resident. It may so happen that the resident is a first degree relative, i.e., son, brother, uncle, sister, aunt, nephew, niece, daughter, father, mother, mother-in-law, father-in-law of the non-resident. Such joint accounts can be opened by the authorised dealers themselves. If the resident accountholder is not a first degree relative, such joint account can be opened only with the prior approval of the Reserve Bank. The resident account-holder can be allowed to freely operate the account ; whereas the non-resident should continue the operation of account in accordance with such directions as the Reserve Bank may issue from time to time [Chapter 27 of the Exchange Control Manual]. The resident can also operate on a non-resident account if he has obtained a power of attorney in his favour granted by the non-resident account-holder. The holder of this power of attorney should operate the account in conformity with such regulations as the Reserve Bank may frame from time to time [vide Chapter 27 of the Exchage Control Manual].

Sub-section (4) lays down that every person and company referred to in sub-section (1) holding at the commencement of this Act any immovable property situate in India shall, before the expiry of a period of 90 days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in Form IPI 6 regarding the immovable property or properties held by such person or company. [This declaration was originally to be filed within 90 days as stated above but this period had been extended from time to time. However, the Reserve Bank extended this period up to 30th June, 1980 with a warning note to the effect that ,'failing which serious view would be taken of the contravention of Section 31 (4) of the said Act. It is further pointed out that no further extention of time will be given for any reasons".] [Vide Press Release No. 114/1970-80 dated 31st December, 1979 issued by the Reserve Bank of India.

However, it may be noted that even where a declaration under sub-section (4) has been made in regard to any immovable property held at the commencement of this Act, the permission of the Reserve Bank would be necessary for continuing to hold thereafter. It will have been observed that Section 31 speaks of "acquiring or holding" ; therefore even in respect of the properties acquired by a person and a company mentioned therein prior to the commencement of this Act, he or it would need the permission of the Reserve Bank to hold such properties after the commencement of the Act. The prohibition that the provisions impose pertains to the act of holding immovable property irrespective of whether or not it was held before or after the commencement of the Act. Although the immovable properties acquired prior to the commencement of the Act have to be declared under Section 31 (4), nevertheless this sub-section does not dispense with the necessity to obtain the permission under Section 31 for continuing to hold these properties. But the Reserve Bank has clarified that the form of declaration under Section 31(4) serves as a composite form, namely both a declaration and an application for permission to continue to hold immovable property held on 1st January, 1974 and accordingly licences under Section 31 would be issued by it on the basis of such declaration. [Clarification No. EC Co.FCS. (iii) 4021/9-74 dated November 7, 1974.]

As regards the assets held by a non-resident, Section 11 of the Act empowers the Reserve Bank to impose certain restrictions on the assets held by a resident outside India or a person intending to become resident outside India. The Reserve Bank may impose a condition that the said assets shall not be transferred, assigned, pleged, charged or dealt with in any manner whatsoever except in accordance with any general or special permission which may be granted conditionally or otherwise by the Reserve Bank. The Reserve Bank may impose such conditions as it may deem fit to impose in the public interest. In this context, it may be noted : (i) that the term "assets" appearing in this section refers to movable as well as immovable asset ; (ii) that the section does not contemplate absolute prohibition but a restriction, inasmuch as it only requires the permission, whether general or special of the Reserve Bank for the purposes mentioned above. When the Reserve Bank receives an application for permission it makes such enquiry as to it may deem fit or proper

for the purpose of determinining as to whether or not the permission is to be granted. The Reserve Bank shall, prior to the said permission being refused, afford to the applicant a reasonable opportunity to make a representation in this behalf. If no communication as to the refusal is transmited to the applicant by the Reserve Bank within 90 days of the date of the receipt of the application it shall be presumed that the Reserve Bank has accorded the permission. For the purposes of computing the aforesaid period of 90 days, the period taken for affording an opportunity to the applicant to make a representation has to be excluded.

Restrictions on persons resident in India associating themselves with or participating in concerns outside India (Section 27) : It has been stated earlier in the study paper that Section 19 deals with 'regulation of export' and 'transfer of securities' and that notwithstanding anything contained in Section 81 of the Companies Act, 1956, no person shall. except with general or special permission of the Reserve Bank, acquire, hold, or dispose of any foreign security. Now, Section 27 lays down that without prejudice to the above restrictions, no person resident in India shall without the previous permission of Central Government, in any way associate himself or participate in any concern outside India engaged in or intending to engage in, any activity of a trading, commercial or industrial nature, whether such concern is a body corporate or not.

This section is intended to regulate foreign investment by Indian residents; it does not apply to foreign nationals. It may be noted that the abovementioned association or participation may be in any manner including that of a promoter. According to the Explanation to the section, it is clear that a person who is merely an employee of the concern outside India, shall not by reason of such employment only be deemed to be associating himself with, or participating in, such concern. It may, however, be noted that the Explanation does not mean that an employee can in no case associate with or participate in any manner than being an employee of the concern. What it really speaks of is that the mere fact of employment will not be taken into account in determining association or participation under the Section. The fact of employment by itself would not be treated as conclusive evidence of the employee not associating himself with or participating in the concern. For that purpose, other independent pieces of evidence are required to be led in before it could be decided whether a person who is an employee in a concern outside India is associting with or participating in that concern in a manner offending the provisions of that Section. In such a case, sole reliance on his being an employee of the concern is neither sufficient nor relevant. Futher, the concern in question need not necessarily be a body corporate; it may be proprietary or partnership concern as well.

Under sub-section (2), any person who desires to seek permission as aforesaid may make an application to the Central Government in such form, in such manner and containing such particulars as may be prescribed. The forms have since been prescribed and the applications for the purpose are required to be made in Form PFC-I. Application for permission to continue association or

participation has to be made in Form PFC-II. The application is required to be submitted in quadruplicate to the Ministry of Finance, Department of Economic Affairs, New Delhi-110001. In so far as industrial joint ventures are concerned, the application has to be submitted to the Ministry of Commerce, Udyog Bhawan, New Delhi-110002. For permission to appoint agent/representative abroad, the applications have to be made in Form OBR-I. Form OBR-II is used for making applications for permission to establish offices or branches in foreign countries. Contractors who intend to submit tenders/offers for overseas construction contracts should apply in Form PEX-1 together with comments of bankers and financing participating bankers (in form PEX-2 for necessary permission). Form PEX-3 is used for an undertaking to reimport equipment taken abroad in connection with execution of a contract; this form has to be stamped as an agreement in the State in which it is executed.

Under sub-section (3), on the receipt of an application referred to in the immediately preceding paragraph, the Central Government may, in fact does, make such enquiry as it deems fit; thereupon, it may either allow such application subject to such conditions, if any, as it may think fit to impose or reject the same. According to the proviso to this sub-section an application is not to be rejected before affording to the applicant a reasonable opportunity for making representation in the matter.

Under sub-section (4), the Central Government may impose such conditions as are, in its opinion, necessary. It may be noted that compliance with such requirement is mandatory.

Under sub-section (5) if any person to whom a permission has been granted does not comply with any condition imposed by the Central Government under sub-section (3) or any requirement directed by the Reserve Bank under sub-section (4) to be complied with, then without prejudice to any other action that may be taken under this Act, the Central Government may, by order, revoke the permission granted under this section. According to the proviso to this sub-section, prior to the revocation of its permission, the Central Government shall give a reasonable opportunity to the person concerned for making a representation in this regard.

Restrictions on the appointment of certain persons and companies as agents or technical or management advisers in India (Section 28): Employment of non-residents in India with liability to repatriate remuneration out of India entails loss of foreign exchange resources to the country. Moreover, such employments are prone to generate unhealthy competition amongst Indian residents. Both these aspects have been taken care of by this Section, in the sense that it lays down certain restrictions on the appointment of certains persons and companies as agents or technical or management adisers in India. Certain provisions have also been enacted and incorporated in this Section to regulate the use of trade marks of non-residents in India by Indian residents for any direct or indirect consideration.

It would be evident from sub-section (1) that Section 28 is applicable to a certain categories of entities. These are—(i) a person resident outside India (whether a citizen of India or not) ; or (ii) a person who is not a citizen of India but a resident in India ; or (iii) a company other than a banking company which is incorporated under any law in force in India ; or (iv) a company in which the non-resident interest is more than 40% ; or (v) a branch of such company. These categories of persons have to obtain general or special permission of the Reserve Bank to do the following acts namely,

(a) to act or accept appointment as agent in India of any person or company, in the trading or commercial transaction of such person or company. It may be noted that according to the Reserve Bank's letter No. EC Co. FCS 1583/22-74 dated September 21, 1974, this also covers "agency agreements under which a company incorporated abroad or in which the non-resident interest is more than 40% acts as agent in India for arranging import of goods into India on behalf of the importers attract the provisions of Section 28(1) (a) ....." It may further be noted in this context that as per the Reserve Bank's letter No. EC Co. FCS/1583/22-74 dated September 21, 1974 "(i) a foreign company purchasing an item from another manufacturer and selling it, whether under its own trade mark or othewise, should obtain the Reserve Bank's permission under Section 28(1) (a), if the item is sold without any 'processing'....." ;

(b) to act or accept appointment as technical or management adviser in India of any person or company. It may be noted that according to the Reserve Bank's letter No. EC Co. FCS/1027/22-74 dated August 7,1974, "foreign nationals who render technical or management advise in India are required to obtain the Reserve Bank's permission under Section 28 of the Act irrespective of whether such advice is tendered to a company in India or abroad" ;

(c) to permit any trade mark (which he or it is entitled to use) to be used by any person or company for any direct or indirect consideration.

Sub-section (2) renders the appointment without permission of the Reserve Bank void. Accordingly, any appointment as an agent or technical or mangement adviser or any permission granted for use of trade mark without the permission of the Reserve Bank shall be void.

As regards the transactions already existing at the commencement of the Act, sub-section (3) provides that even in the case of existing appointment as agent or technical or management adviser or permission to use trade mark the permission of the Reserve Bank should be obtained for its continuance by persons referred to in sub-section (1). Where no such application has been made, the Reserve Bank may, under sub-section (6), direct the person or the company concerned (including its branch) to desist from such acting or appointment or as the case may be, from permitting the use of any such trade mark on the expiry of such period as may be specified in the direction. According to the proviso to sub-section (6), no direction

shall be made unless the parties who may be affected by such direction have been given a reasonable opportunity for making a representation in the matter. By virtue of sub-section (7), where any such direction has not been complied with by any person or company (including its branch) then, without prejudice to any action that may be taken under this Act, the acting, appointment or permission as the case may be, shall be void with effect from the expiry of the period specified in the direction.

According to sub-section (4), on the receipt of an application under sub-section (3), Reserve Bank may, after making such enquiry as it deems fit, either allow the application subject to such conditions, if any, as the Reserve Bank may think fit to impose or reject the application. However, an application cannot be rejected unless the parties who are likely to be affected by such rejection have been given a reasonable opportunity to make a representation in the matter.

By virtue of sub-section (5), if an application has been rejected under sub-section (4), the acting, appointment or permission as the case may be, shall be void on the expiry of a period of 90 days or such other later date as may be specified by the Reserve Bank, from the date of receipt by the person or company (including its branch) concerned of the communication conveying such rejection.

Explanation to the Section defines the following terms thus: (a) 'agent' includes any person or company (including its brahch) who or which buys any goods with a view to sell such goods before any processing thereof; (b) 'company' means any body corporate and includes a firm or other association of individuals; (c) 'processing' means any art or process for processing, preparing or making an article by subjecting any material to a manual, mechanical, chemical, electrical or any other like operation; but the term does not include any process incidental or ancillary to the completion of a manufactured product such as dividing, pressing, compressing, packing, repacking, labelling, relabelling, branding or the adoption of any such treatment as is necessary to render such product marketable to the consumer; (d) "technical or management adviser" includes any person or company (including its branch) required to render any technical or management advice even though the tendering of such advice is incidental to any other services required to be rendered by such person or company.

In pursuance of Section 28(1) of the FERA 1973, the Reserve Bank has permitted "any person not being a citizen of India to accept appointment as technical or Management Adviser in India or any person or company:

Provided that—(i) the appointment of such person has been sponsored by Canadian Executive Service Overseas or British Executive Service Overseas; (ii) the appointment of such person is approved by the Department of Industrial Development, Government of India; and (iii) the person so appointed shall not be negligible to remittance of any foreign exchange out of any monies received by him in India" [vide Notification No. FERA. 46/77-R.B. dated September 3,

1977]. Thus, subject to the 3 conditions above the Reserve Bank has given the general permission to any person not being an Indian citizen, to accept appointment as a technical or management adviser in India or any person or company.

It may be noted that in pursuance of Section 28 (1) of the FERA 1973, the Reserve Bank has granted "permission to every person and company referred to in that sub-section and every branch of such company, to permit any trade mark, which he or it is entitled to use, to be used by any person or company for any direct or indirect consideration, subject to the condition that—(a) such trade mark is to be used only in respect of such goods as are intended to be wholly exported outside India to countries other than Nepal and Bhutan ; (b) before seeking remittance of any consideration or any part thereof for having permitted the use of such trade mark, the grantor of said permission obtains and furnishes to the Reserve Bank a certificate from the auditor of the grantee thereof stating—(i) the brief description, quantity and value of the goods covered by the trade mark in respect of the use of which remittance is sought ; (ii) the total amount of consideration (direct or indirect) paid to the grantor for the use of such trade mark ; (iii) whether the entire consideration (direct or indirect) given to the grantor was used only in respect of such goods as are intended to be wholly exported outside India to countries other than Nepal and Bhutan. Explanation : in this notification 'auditor' means (i) in the case of a grantee which is a company, an auditor appointed under the companies Act, 1956 (1 of 1956), and (ii) in any other case a person qualified to act as auditor of a company under the said companies Act, 1956 [Notification No. FERA 27/75-R B. dated 19th April, 1975].

It may be noted that pursuant to Section 28(1) of the FERA 1973, the Reserve Bank has granted vide its letter No. G.S.R. 508 dated the 6th March 1976 "general permission to every person and company referred to in that sub-section and every branch of such company, to permit the trade marks with respect to the items of drugs and pesticides and other chemicals used for plant protection set out in the schedule annexed to this letter and which he or it is entitled to use, to be used by for any direct or indirect consideration.

The application for permission of the Reserve Bank under Section 28 has to be made in quadruplicate in form FNC-4 for acting or accepting appointment as agent in India for any person or company ; form FNC-5 for acting or accepting appointment as technical or management advisor in India for any person or company ; and form FNC-6 for the applicant permitting the use of trade marks which he or it is entitled to use, by any person or company.

Prior permission of the Reserve Bank is required under Section 30 for taking up employment, etc., in India by nationals of foreign States. This Section contains general provisions relating to regulation of employment, profession, trade, business or occupation of foreign nationals in India. It may so happen that a foreign national desires to take up any employment in India or practise any profession or

carry on any occupation, trade or business in India. If by reason of such employment or the practicising of such profession or the carrying on such occupation, trade or business the foreign national desires to acquire any foreign exchange (such foreign exchange being intended to be repatriated out of India) out of the monies received by him in India, then he must have the previous permission of the Reserve Bank. If there is no such intension of repatriation of foreign exchange, then the previous permission of the Reserve Bank will not be necessary. For the purpose of obtaining the aforesaid previous permission, the foreign national has to make an application to the Reserve Bank in form EFN-I for taking up employment in India and in form EFN-II for practising any profession or carrying on any occupation, trade or business in India by a foreign national. An application in form EFN-I has to be submitted in quadruplicate to the Reserve Bank through prospective employer and should be accompanied by——(a) a certified copy of the contract (in duplicate) giving terms and conditions of employment; and (b) the applicant's current passport. If, however, the applicant is in India at the time of completion of form EFN-I, his passport should be submitted to the Reserve Bank for verification within 15 days of his arrival in India. An application in form EFN II has to be submitted directly to the Reserve Bank in quadruplicate together with the applicant's current passport. If the applicant is not in India at the time of submission of this application, his passport likewise should be submitted to the Reserve Bank for verification within the same period of 15 days after his arrival in India. If the applicant is a national of a Commonwealth country, he too will have to make a declaration in the form specified in the 7th Schedule to the Foreign Exchange Regulation Rules, 1974. Applications for permission to continue the existing arrangements or to enter into new arrangements have to be submitted in the prescribed form as aforesaid to the Controller of Foreign Exchange, Control Division, Reserve Bank of India, Central Office, Bombay-1 [vide Press Notes issued by the Reserve Bank of India, Press Relations Section, Central Office, dated 31st December, 1973]. On the receipt of this application, the Reserve Bank may, after making such enquiry as it deems fit, allow the application subject to such conditions, if any, as it may think fit to impose or reject the application. However, before rejection of the application the applicant ought to have been given a reasonable opportunity for making a representation in the matter.

This Section is applicable in respect of employment in India on or after 1st January, 1974. According to Reserve Bank's letter No. EC Co. FCS.1027/22-74 dated 7th August, 1974, "this section would be applicable in respect of employment taken up in India on or after 1st January, 1974. In the case of foreign nationals who had taken up employment in India before 1st January, 1974, the provisions of Section 30 would be 'attracted' only if the subsisting contract of employment is either renewed or novated by alteration in material terms (with regard to emoluments payable etc.) after the commencement of the Act. We may also add that although as stated, Section 30 would not apply to employments taken up prior to 1st January, 1974, the provisions of Section 28 (3) would be attracted if the appointments are held by foreign nationals (since prior to the above date) in the capacity of

technical or management advisors and accordingly it is necessary for them to apply to the office in the prescribed form before 31st August, 1974 for permission to continue to act or hold such appointments."

As regards engagements of foreign nationals in India, according to Press Release No. 33/1979-80 dated 6th August, 1979, "the procedure governing engagement of foreign nationals in technical as well as non-technical fields by Indian firms, and companies has further been streamlined in order to cut down delays and to avoid unnecessary correspondence. As the Government has to take a total view of employment of foreign nationals, including the foreign exchange expenditure resulting from such employment, it has been decided tnat the Indian firms and companies intending to engage the services of foreign technicians may hereafter apply directly to the Administrative Ministry of the Government of India even if the period does not exceed 12 months. After the Government's approval is obtained by an applicant-company, the foreign technicians to be employed in India should submit to the Reserve Bank of India application in form EFN-1 through the company for permission under Section 30 of the Foreign Exchange Regulation Act.

Where technicians are required to be engaged for periods exceeding in the aggregate 12 man-months in connection with the implementation of new industrial projects or for expansion of existing industrial projects, the present procedure for *obtaining package approval from the Administrative Ministry of Government of* India, for technical services, arrangements covering the entire requirements of the projects will continue to be in force.

The Reserve Bank will continue to deal with applications from industrial enterprises desirous of engaging foreign technicians for short periods not exceeding 3 months for attending to break-downs, overhauling and maintenance of plant and machinery imported from abroad, such application has to be made to the concerned office of the Exchange Control Department as hitherto."

Restrictions on establishment of place of business in India (Section 29) : Sub-section (1) imposes certain restrictions on : (a) establishment in India of a branch, office or other place of business ; (b) carrying on of any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under Section 28 ; (c) acquiring of the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry ; (d) purchase of the shares in India of any company mentioned in clause (c) above. According to the Reserve Bank's letter No. EC Co. FCS 1027/22-74 dated 7th August, 1974, which was in reply to an enquiry as to whether a company having a resident representative or sales engineer stationed at a place in India which is neither the head office nor the branch office to be considered as a place of business in India for purposes of Section 29 (1) (a), "Since the foreign company would be deemed to be carrying on commercial activity in India through its representative it would have to obtain Bank's permission in terms of Section 29 (2) of the Foreign Exchange Regulation

Act, 1973 to continue to carry on the said activity". Thus it is clear from this clarification that a company having a resident representative stationed at a place in India which is neither its head office nor branch office, would be deemed to be carrying on commercial activities in India. "If a company incorporated abroad or in which non-resident interest is more than 40% or any branch of such company is required to post a sales engineer for rendering after sales service to its customers, the company would be deemed to be establishing a place of business in India for undertaking trading/commercial activity and it will be necessary for it to obtain Bank's permission under Section 29 (1) (a) of the Act. As regards the opening of a site office where a foreign company is executing contract for installation of plant and machinery, construction of a building etc., it is advised that if the company has obtained Reserve Bank's approval for executing the contract under Section 29 (1) (a) or 29 (2) (a) of the FERA, 1973, as the case may be, a separate permission for opening of the site office for the purpose will not be necessary" [Vide letter No. Co. FCS 2757/106-75 dated 10th October, 1975]. It is thus evident from this clarification that posting of a sales engineer for rendering after-sales services to the customers of the company is regarded as establishing a place of business in India.

Sub-section (1) further provides for the general or special permission of the Reserve Bank to be obtained for carrying on any of the activities mentioned above. The Reserve Bank's permission in this regard has to be obtained by the following categories of persons, viz.—(i) a person resident outside India (whether a citizen of India or not); or (ii) a person who is not a citizen of India is a resident in India; or (iii) a company (other than a banking company) which is not incorporated under any law in force in India; or (iv) a company in which the non-resident interest is more than 40%; or (v) any branch of aforesaid company.

According to Explanation to the Section, a 'company' has the same meaning as in clause (b) of Explanation to Section 28, that is, any body corporate and includes a firm or other association of individual. According to the Reserve Bank's letter No. Co. FCS. 2757/106-75 dated October, 10, 1975, "if the company has obtained the Reserve Bank's approval for executing the contract under Section 29 (1) (a) or Section 29 (2) (a) of FERA, 1973, as the case may be, a separate permission for opening of the site office for the purpose will not be necessary."

In respect of such persons as aforesaid, sub-section (2) says that such persons or companies may make an application to the Reserve Bank within a period of 6 months from the commencement of the Act (or such period as the Reserve Bank may allow in this behalf) for permission to continue to carry on such activities and their establishments. The sub-section also states that the application may be granted or rejected by the Reserve Bank after making due enquiry and considering the representation that may be made in this behalf. It has also been laid down that if the application is rejected by the Reserve Bank, then such persons or companies must discontinue their activities and close down their establishment within 90 days of the rejection of their application or within such time as may be given to them by

the Reserve Bank. Further, where a person or company is required to make the application for permission to continue its activities of establishments but makes no application, the Reserve Bank can call upon such person or company to discontinue its activities and to close down their establishments ; but before any such order is made the Reserve Bank has to give a reasonable opportunity to the parties affected to make representation in the matter.

An application for permission under this Section shall be made in quadruplicate in the prescribed forms, viz., FNC-1 for undertaking in India of an activity of trading, commercial or industrial nature or for establishing in India a branch/office or other place of business for carrying on such activities (a composite application should be submitted for all the items of manufacture/activities to be undertaken by the applicant) ; FNC-2 for acquiring the whole or any part of an undertaking in India of any person or company carrying on trade, commerce or industry ; FNC-3 for purchase of shares in India of any company for carrying on trade, commerce or industry ; FNC-7 for carrying on in India an activity of trade, commerce or industrial nature, or for establishing in India a branch office or other place of business for carrying on such activity or for continuing the establishment of such a branch/office etc., ; FNC-8 for continuing to hold shares in India of any company carrying on trade, commerce or industry (this form to be completed by companies incorporated abroad or in which non-resident is more than 40%—a composite application to be submitted for all the shares held by the applicant) ; FNC-9 for continuing to hold shares in India of any company carrying on trade, commerce or industry (this form to be completed by individuals including Indian nationals resident outside India and foreign citizens resident in India—a composite application to be submitted for all shares held by the applicant) ; FNC-10 for establishing an office or posting a representative in India by an overseas company for carrying on liaison activity.

The Central Government has issued certain guidelines for administering Section 29 of the FERA, as well as clarification and amplification to the guidelines. These guidelines are suggestive of the policy to be followed by the Reserve Bank in dealing with applications made to it under Section 29. They do not, however, exempt any company falling within the purview of this Section from complying with its provisions [Reserve Bank's letter No. EC. Co.FCS 1583/22-74 dated 25th September, 1974].

The guidelines mentioned above apply to : (a) Indian companies having more than 40% foreign holdings, and (b) branches of foreign companies operating in India. It may be noted that these guidelines do not govern non-resident of Indian origin who have been allowed by the Government of India to invest in India on a specific condition that neither the capital nor profits/dividends will be allowed to be repatriated. A probe into guidelines would reveal that they classify all the companies into 5 broad categories on the basis of their activities. These categories are—(i) industrial activities, (ii) trading activities, (iii) other specified activities, (iv) airlines and shipping companies, and (v) miscellaneous. The companies have been further subclassified under some of these 5 categories. The first category of companies based on the industrial activities has 4 sub-categories of companies, viz.,

(a) companies engaged in the production of items specified in Appendix I of Industrial Licencing Policy, February 1973 or engaged in a predominently export-oriented industry (minimum exports being 60% of total production); (b) companies having an industrial licence after February, 1970 for manufacturing in the production of items specified in Appendix I of the Industrial Licencing Policy, 1973 or engaged in predominently export-oriented industry (minimum exports being 60% of the total production); (c) companies having a valid industrial licence and engaged in production of items not specified in Appendix I of the Industrial Licencing Policy, 1973, but engage in the manufacturing activities which need sophisticated technology; (d) companies engaged in other manufacturing activies.

Under the second category of companies based on trading activities, there are two sub-categories of companies, namely—(a) companies engaged predominently in internal trading and commercial activities; and (b) manufacturing companies i.e., companies engaged in trading activities in respect of products not manufactured by them.

Companies falling under the third category based on other specified activities are again sub-classified into companies engaged in: (a) construction activities, (b) plantation activities, (c) consultancy work by technical and engineering consultants and by non-technical consultants and (d) by manufacturing companies engaged in consultancy work.

The guidelines contemplate conversion of branch of foreign companies, save and except airlines and shipping companies, into Indian companies in terms of the Government policy with a minimum Indian equity participation of 26% and with a maximum of 74% foreign equity shareholdings. This is however subjected to two exceptions. Foreign equity of more than 74% may be allowed in the following two cases, namely——(i) 100% export oriented units depending on the merits of each case, and (ii) airlines and shipping companies based on reciprocity. The percentage of foreign equity holding between 40% and 74% has to be determinined only by the Reserve Bank judging from the merits of each case, e.g., developing expertise, skills or facilities (distribution net work etc.) not readily available indigenously and export contribution etc. The Reserve Bank is also at liberty to fix the period over which such percentage is to be reached. In the matter of according fresh approvals to the cases as per the guidelines, due consideration is also given to other relevant aspects like research and developmental programme initiated by the indian company and stipulations regarding transferability of technology from the foreign collaborators to the Indian company, sub-licencing of technology, acquistion of raw-materials and components from the foreign collaborators and existing regulation in respect of the patent law etc. According to the guidelines, Indian companies with 40% foreign shareholding and branches of foreign companies may continue their existing activities after increasing within the specified period Indian participation to not less than 26% of the equity of the company (in the case of branches after converting themselves into Indian companies), should they be engaged in production of items specified in Appendix I of the Industrial Licencing Policy of 1973 or engaged in a predominently export-oriented industry or engaged in manufacturing of other activities

which need sophisticated technology or specialised skills or are engaged in tea plantation activities. All other companies, be they engaged in manufacturing or trading companies, have to bring down foreign shareholding to the level of 40%. However, the principle of reciprocity governs the functioning of the branches of airlines and shipping companies operating in India. The guidelines also stipulate that if a company is engaged in multi-activity operations then a total view shall be taken of all the activities in which a company is engaged while considering the question of allowing it to carry on business. The proportion of output covered by Appendix I of the Industrial Licencing Policy of 1973 and those falling outside the ambit of this will be a material consideration.. If activities outside Appendix I constitute only a minor part of the total activities of the companies (not exceeding 25% of the ex-factory value of the annual production or Rs. 5 crores whichever is less) then it shall be allowed to continue on the basis of existing approvals provided Indian participation is not less than 26% of the equity of the company.

If a company is engaged in production of items specified in Appendix I of Industrial Licencing policy or if it is engaged in export-oriented industry, then it will be subject to dilution formula as and when they come up for expansion. It may be recapitulated that predominently export-oriented industry is one of which minimum export is 60% of its total production. According to letter No. 14/1/79 EF (INU) dated February 8, 1979 issued by the Government of India, Ministry of of Finance (Department of Economic Affairs), "weight can be given only for direct export undertaken by companies in India in deciding the level of non-resident interest....."

According to the Reserve Bank's letter No. EC Co. FCS 1027/22-74 dated 7th August, 1974, "for the purpose of determining whether the applicant-company's activity predominently is export-oriented or not, the total production of all items produced by it would be taken into account. The value of the company's exports should not be less than 60% of the total ex-factory cost, less excise duty (if any), of its annual production as clarified by the cost accountant (in practice)."

According to the clarification and amplification of items for administering Section 29 of Foreign Exchange Regulation Act, 1973, (a) if the activities of a company under Appendix I combined with activities requiring sophisticated technology and exports, accounted for not less than 75% of the annual turnover, such a company would be allowed to continue its activities subject to the condition that it would increase Indian participation within a specified period, to not less than 26% of the equity of the capital ; (b) if the activities of a company under Appendix I together with activities requiring sophisticated technology and exports account for not less than 60% of the total turnover, such a company will be allowed to continue its activities, subject to the condition that it will increase within a period, Indian participation to not less than 49% of the equity of the company. In such cases, a condition would be stipulated that the company concerned should undertake to export a minimum of 10% of its total annual turnover within a period of 2 years commencing from the date of approval of the Reserve Bank ; (c) if the exports of a

company account for more than 40% of the total annual turnover, such a company will be allowed to continue its activities subject to the condition that it will increase, within a specified period, Indian participation to not less than 49% of the equity of the company.

The Department of Science and Technology is consulted when the companies engaged in manufacturing activities requiring sophisticated technology make an application in this regard. All relevant aspects like import substitution and impact on economy are given due weightage on. Fresh foreign equity participation is not granted to companies predominently engaged in internal trading and commercial activities. Such predominently engaged companies as well as companies which are engaged in manufacturing activities not specified in Appendix I of the Industrial Licencing Policy, 1973 and which do not require any sophisticated technology, will have an option either to reduce their foreign equity holding to 40% or to covert themselves into predominently manufacturing companies in the areas specified in Appendix I of the Industrial Licencing policy, 1973, or as the case may be, to engage themselves in predominently export-oriented industries. If these conditions are not acceptable to the company, it is allowed to wind up its business.

In the interest of consumers, a manufacturing company may be allowed to carry on internal trading in essential or associate products or to develop ancillaries. But the articles so traded should functionally pertain to the company's main manufacturing activities and constitute relatively a small portion of the overall activities not exceeding 25% of the ex-factory value of the annual production or Rs. 5 crores whichever is less]. However, for the purpose of internal trade, the company will not be allowed to use its trade mark or brand names in respect of the products not manufactured by it. Manufacturing companies may also be allowed to act as consultants in these areas in which they have developed specialisation. But the companies predominently engaged in trading and manufacturing activities cannot avail themselves of this facility.

The Reserve Bank, through its Press Note dated 28th November, 1974, granted "general exemption to companies incorporated in India, in which the non-resident interest does not exceed 74% of their total equity capital, from the operations of the provisions of Section 29(2) of the Foreign Exchange Regulation Act, 1973. Under this section, it will be recalled, all companies (other than banking companies) which are incorporated abroad, or in which the non resident interest is more then 40%, as well as branches of such companies, are required to obtain the permission of the Reserve Bank to continue their trading, commercial or industrial activities in India which they have been carrying on since prior to 1st January, 1974. The exemption now granted is, however, applicable only in the case of following categories of companies which have been granted licences after February 1970 under the Industries (Development and Regulation) Act, 1951 : companies engaged exclusively in the production of items specified in Appendix I to the Industrial Licence policy, 1973. Export-oriented companies the annual average ex-factory cost (excluding excise duty payable) of whose products exported during the last 3

years to places outside India (other than Nepal and Bhutan) is not less than 60% of the total ex-factory cost of annual production. The companies so exempted are required to file a declaration with the Reserve Bank in the prescribed form before February 24, 1975.

Pursuant to Section 29(1) of the FERA, 1973 the Reserve Bank, through its Notification No. FERA 22/74-R.B. dated January 11, 1974, has granted "general permission to shipping companies which are not incorporated in India and which do not have a branch office or other place of business in India, to carry on in India through their local agents and subject to the other provisions of the said Act and of any rules, directions or orders made thereunder, their normal commercial activities like transportation of goods and passengers, and collection of freight charges and fares".

Restriction on settlement etc. (*Section 24*) : This section has sought to control, regulate, prohibit payments or remittances in favour of non-resident in pursuance of any settlement of property by sale as well as by gift, without the general or special permission of the Reserve Bank. It may be noted that a settlement is an instrument by which the interest in the immovable or moveable property is disposed of or agreed to be disposed of and which may affect devolution of successive interest in such property. Settlement may be of two types, *viz.*, testamentary and non-testamentary. The testamentary type of settlement would be trusts created by will or its codicil. As a result of this section, no person resident in India can create a trust in favour of a non-resident residing in territories other than the notified territories, without the permission of the Reserve Bank. According to the proviso to this section, any settlement or gift or any power exercised without the permission of the the Reserve Bank shall not be invalid merely on the ground that such permission has not been obtained. By virtue of Notification No. FERA. 13/74-R.B. dated 1st January, 1974 as amended up to May 21, 1979, issued by the Reserve Bank of India, "the prohibition imposed by that section (Section 24) shall not apply to the making of any settlement or gift of any property outside India by any foreign citizen resident in India but not permanently resident therein."

Certain Provisions as to Companies (Section 26) : Subsection (1) has bestowed vital powers on the Central Government or the Reserve Bank with a view to regulating and controlling certain foreign companies. Such companies are those which are mentioned in Explanation I. Sub-section (1) will apply to the foreign companies if they fulfil the following conditions, viz.—(a) if such company is controlled by persons resident in India, i.e., if such non-resident interest is 49% or less ; or (b) if the company is such that more than one-half of the sums which, on its liquidation, would be receivable by, or for the benefit of, persons resident in India ; or (c) if the company is such that more that one-half of the assets which on liquidation thereof would be available for distribution after the payment to the creditors would be receivable directly or indirectly by, or for the benefit of, persons resident in India ; or (d) if the company is such that more than one-half of the interest payable on its loans or dividends payable on its preference or ordinary share capital is receivable

by or for the benefit of persons resident in India. These companies as aforesaid are known as foreign companies. According to Explanation II, where the identity of the persons by whom or for whose benefit any sum, assets, interest or dividends are directly or indirectly receivable depends on the exercise, by any person resident in India, of a power vested in him in that behalf, such sum, assets, interest or dividends are for the purpose of clause (b) of Explanation I, be deemed to be receivable directly or indirectly by or for the benefit of persons resident in India. According to Explanation III, "non-resident interest" signifies participation in the share capital by, or entitlement to the distributable profits of, any individual or company resident outside India, or any company not incorporated under any law in force in India, or any branch of such company whether resident outside India or not; further, this definition is also applicable to the provisions as contained in Sections 28, 29 and 31.

From the definition of "person resident in India", as contained in Section 2(p), it is clear that an Indian national migrating abroad will be regarded as a person resident outside India, that is, as a non-resident. Accordingly, if such non-resident person holds any shares in a company, such shareholding will be regarded as non-resident holding both legally and technically; such share-holdings have to be taken into consideration while reckoning "non-resident interest" for the purpose of administration of Sections 26, 28, 29 and 31. According to the clarification regarding definition of non-resident shareholding under this Act issued by the Government of India vide their letter No. 1/22/75 FF(INU) dated January 5, 1978, "it has been decided that the Reserve Bank of India could take a liberal view, administratively in such cases and give its clearance for the purposes of Sections 26(7), 28, 29 and 31 of the Act. In other words, for purposes of these sections and for reckoning non-resident interest, the Reserve Bank of India would exclude the shares held by Indian national who might have migrated abroad." However, the companies have to report such changes in the status of Indian shareholders. According to the Reserve Bank's letter No. EC Co. FCS. 1767/22-80 dated February 18, 1980, "the Reserve Bank of India would be prepared to grant general permission under Sections 26(7), 28, 29, and 31 of the Foregn Exchange Regulation Act, 1973, provided —(a) the non-resident shareholdings which enjoy the facility of repatriation/remittance of capital and dividends do not exceed 40% of the total paid up capital of the company; and (b) the entire non-resident interest in excess of 40% consists of shares held by non-residents of Indian natiionality/origin on non-repatriation basis, that is, without any right of repatriation of the capital invested in such shares or the dividend income accruing thereon. In order to minimise references to the Reserve Bank consequent upon any changes in the shareholdings of the type referred to at (b) above after the grant of general permission, the Reserve Bank of India would consider fixing a reasonable ceiling on such shareholdings on the merits of each case so that the general permission continues to remain valid so long as the limits so fixed is not exceeded. Accordingly, companies concerned may please be advised to approach to Reserve Bank for grant of general permission referred to above giving relevant details of the resident and non-resident shareholdings."

Sub-section (2) should be read without prejudice to the generality of sub-section (1) because it merely sets out what the notice required to be issued under sub-section (1) may contain, and is merely illustrative. This sub-section states that by notice the person in authority of such company may be required : (i) to furnish either to the Central Government or to the Reserve Bank particulars of its assets and business as may be specified in the notice ; (ii) to sell or procure the sale of any foreign exchange through any authorised dealer, the only condition being that the order or notice can only be issued in respect of foreign exchange which such company is entitled to deal with ; (iii) to declare and pay such dividend as may be stated in the notice ; (iv) to release any of its assets in such manner as may be stated in the notice ; (v) to refrain from selling or transfering or doing anything which affects the company's rights or powers in relation to any instruments or securities mentioned in the notice. Thus, sub-section (1) read with sub-section (2) empowers the Central Government or the Reserve Bank to require a foreign company to the above-mentioned 5 things.

To enforce compliance with any of the aforesaid requirements by the foreign company, the Central Government or the Reserve Bank has the discretion to tender a notice in writing to any person resident in India mentioning therein that it desires the specified requirements to be complied with by the company ; also the Central Government or the Reserve Bank may direct that person to do or refrain from doing any act which will—(a) cause the foreign company to comply with such requirements or, (b) remove any obstacle or render it in any respect more probable so that the foreign company can comply with the aforementioned requirements.

According to a clarification issued by the Reserve Bank of India vide letter No. EC. Co. FCS 4273/22-78 dated May 24, 1978, "it is clarified that on a recent review of the policy followed by the Reserve Bank in this regard, it has been decided to relax the restriction on declaration of dividend on merits of each case provided the FERA company has submitted to the Reserve Bank its firm and concrete dilute proposals for dilution of foreign equity to the required level. In fact, this restriction has already been relaxed in the case of some FERA companies. It may be mentioned in this connection that the restriction that EERA company shall not declare and pay any dividend till the required level of non-resident interest is achieved in accordance with the Bank's directive under FERA, 1973, has been imposed by the Bank at the time of granting extension of time beyond the original time limit of one or two years allowed for dilution of foreign equity. In terms of Reserve Bank's directives, FERA companies are required to submit to Bank their firm and concrete proposal for bringing down their non-resident interest to the specified level within a period of three months from the date of receipt of Reserve Bank's communication. If, therefore, the FERA company has submitted its dilutive proposals, and taken other necessary steps in time and also been earnest to comply with the Bank's dilution within the stipulated time, the need for extension of time and consequent imposition of the condition in relation to declaration and payment of dividend would not have normally arisen."

According to sub-sections (3), (4), (5) and (6) a person resident in India is also required to secure the general or special permission of the Reserve Bank for the following purposes, viz.,

(a) For increasing non-resident interest in any business outside India to more than 49%. Thus, sub-section (3) prohibits any person resident in India and having 51% or more interest in any business outside India from doing any act whereby his interest in the said business is reduced and whereby the interest of the non-resident becomes more than 49%. If such an eventuality arises and becomes essential to do what has been prohibited, general or special permission would become necessary ;

(b) For transfering or creating any interest in any business in India to, or in favour of, a person or company to which Section 29 (1) of the Act applies. In other words, sub-section (5) provides that no person resident in India, shall transfer any interest in a business in India, or create any such interest in such business, to or in favour of : (i) a person resident outside India (whether a citizen of India or not) ; (ii) a person who is not a citizen of India but is resident in India ; (iii) a company (other a banking company) which is not incorporated under any law in force in India; and (iv) a company (other than a banking company) in which the non-resident interest is more than 40% ;

(c) For giving any guarantee in respect of any debt, obligation or other liability of a person resident outside India or of a non-resident. According to Reserve Bank's Notification No. FERA 16/74-R.B. dated 11th January, 1974, the Reserve Bank, pursuant to Section 26 (6) of the FERA, 1973, has given a general permission to "(a) authorised dealers, subject to such restrictions as may be imposed by the Reserve Bank from time to time, (i) to give guarantees in favour of persons resident in India in respect of any debt or other obligation or liability of persons resident outside India, (ii) to give performance bonds or guarantees (including those in lieu of earnest money) in favour of overseas buyers on account of *bona fide* exports made from India ; (b) firms and companies resident in India to give guarantees to Income-tax Officers and other authorities under the Income-tax Act, 1961 (43 of 1961), in respect of taxes due by nationals of foreign States in employ of such firms or companies." Through Notification No. 35/76-R.B. dated 10th April, 1976, the Reserve Bank has also granted general permission to "shipping agents to give, in respect of any debt or other obligation or liability of their foreign shipping principals, guarantee in favour of any officer or other authority appointed or constituted under—(a) the Income-tax Act, 1961 (43 of 1961) ; (b) the Customs Act, 1962 (52 of 1962) ; (c) The Major Port Trusts Act, 1963 (38 of 1963) ; (d) any other Central or State Act."

(d) For lending or depositing any money to any foreign controlled companies/firms. Sub-section (7) provides that no person resident in India shall: (i) lend any money or (ii) deposit any money with any firm or company (other than a banking company) in which the non-resident interest is more than 40%. It further states that such a firm or company shall not borrow money from a person resident in India; also that

such firm or company shall not accept any deposit of money from a person resident in India except with the general or special permission of the Bank. Thus, the duty is now also cast on the non-resident borrower to obtain the permission of the Bank. In pursuance of Section 26 (7), the Reserve Bank has granted general permission with respect to such firm or company for : "(i) the making of any security deposit by any employee of such firm or company and the acceptance of such deposit by such firm or company ; (ii) the making of any payments (whether by way of advance or otherwise) to such firm or company, by purchasing, selling or other agents in the course of, or for the purpose of, the business of such firm or company, or against orders for goods, properties or services and the acceptance of such payments by such firm or company ; (iii) the lending of any money to, or the making of any deposit with, such firm or company, as has been permitted under clause (i) or clause (ii), to borrow money or, as the case may be, to accept deposits." [Notification No. FERA 17/74-R.B. dated 11th January, 1974].

A firm or company (other than a banking company) having non-resident interest of more than 40% is prohibited, except with the general or special permission of the Reserve Bank from borrowing or accepting a deposit of any money from a person resident in India. According to the clarification of the Reserve Bank vide their letter No. EC. Co. FCS. 1 27/22/74 dated 7th August, 1974, "a foreign company intending to sell the land or any immovable property in India owned by it should obtain prior permission of the Reserve Bank to dispose of the property in terms of Section 31 of the Foreign Exchange Regulation Act, 1973. In case prior permission has been obtained under Section 31 of the Act, it would be in order for the company to accept deposit in connection with the sale of the property. As regards the acceptance of security deposits from vendors and other contractors, prior permission of the Reserve Bank will be necessary under Section 26 (7) of the FERA, 1973."

If a person intends to lend money to, or make a deposit with, a firm or company as aforesaid, he would do well to satisfy himself that the firm or the company concerned has been permitted to borrow money or accept deposits. An application for permission to obtain or to grant loans/overdrafts has to be made in Form L.O.V. 1. An application for permission to accept deposits is to be made in Form L.O.V. 2. "Firms/companies of the kind referred to, intending to borrow from any bank authorised to deal in foreign exchange in India are required to submit the application in the prescribed form to the bank concerned. Where, however they propose to borrow from other sources or to accept deposits from residents in India, the registered/head/principal office the firm/company should make an application in the prescribed form direct to the office of the Reserve Bank within whose jurisdiction the applicant's office is situated. The prescribed application forms can be obtained from any office of the Reserve Bank or any bank authorised to deal in foreign exchange." [Press Note dated January 14, 1974 issued by the Reserve Bank of India.]

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COMPANY LAW

STUDY — X

Capital Issues (Control) Act 1947 and Exemption Order issued thereunder, etc.

Introduction : Having thought it expedient to provide for control over the issues of capital, this enactment was brought into existence. It extends to the whole of India except the State of Jammu & Kashmir; it applies also to citizens of India, outside India (Section 1).

Definitions (Section 2) :

(a) *Company :* It means a company as defined in Section 3 of the Companies Act, 1956 and includes a foreign company within the meaning of Section 591 of the Companies Act

(b) *Issues of Capital :* The phrase means the issuing or creation of any securities whether for cash or otherwise, and includes the capitalisation of profits or reserves for the purpose of converting partly paid-up shares into fully paid-up shares or increasing the par value of shares already issued.

(c) *Private Company :* It means a Private Company as defined in Section 3(1)(iii) of the Companies Act.

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(d) *Prospectus*: Prospectus means any prospectus, notice, circulars, advertisements or other document inviting offers from the public for the subscription or purchase of any securities of a company.

(e) *Securities*: This term means any of the following instruments issued, or to be issued, or created or to be created, by or for the benefit of the company, viz., (i) shares, stocks and bonds; (ii) debentures; (iii) mortgage deeds, instruments of pawn, pledge or hypothecation and any other instruments, creating or evidencing a charge or lien on the asset of the company; and (iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party.

(f) *States*: The word means the territories of India to which this Act extends.

Sub-section (2) of Section 2 provides that any reference in this Act to offering securities to the public has to be construed as including a reference to offering them to any section of the public, whether selected as members, debentureholders or holders of any other securities of the company concerned or as clients of the person issuing any prospectus in relation to such securities, or selected in any other manner. However, according to the proviso to this sub-section, this provision must not be taken as requiring any offer to be treated as made to the public if it can properly be regarded, in all circumstances, as not being calculated to result directly or indirectly in the securities becoming available for the subscription or purchase by persons other than those receiving the offer, or otherwise as being a domestic concern of the persons making or receiving it.

Control over issue of capital: It has been stated in the introductory part that the Capital Issues (Control) Act is designed to provide for control over issues of capital. For the purpose of exercise of this control over issue of capital, Section 3 provides that no company incorporated in the States shall, except with the consent of the Central Government, make an issue of capital outside the States. Further no company whether or not incorporated in the States shall, except with the consent of the Central Government, do the following things: namely—

(a) Make an issue of capital in the States;

(b) Make in the States any public offer of securities for sale;

(c) Renew or postpone the date of maturity or repayment of any security maturing for payment in the States.

Thus these provisions enable the Central Government indirectly to exercise its control by preventing these acts from being done without the consent of the Central Government.

On the receipt of the application for the purpose, the Central Government may make an order according recognition to the issue of capital made or to be made outside the States by a company not incorporated in the States [Sub-section (3)].

The Central Government may qualify any consent or recognition accorded by it under Sub-section (2) or Sub-section (3) with such conditions, whether for immediate or future fulfilment, as it may think fit to impose; and where a company acts in pursuance of such consent or recognition, it has to comply with the terms or conditions so imposed [Sub section (4)].

If any application for consent or recognition of the Central Government under any of the provisions of Section 3 is refused then the Central Government will be under an obligation, upon the request of the applicant, to communicate to him in writing the reasons for such refusal [Sub-section (5)].

The Central Government is at liberty to revoke at any time the consent or recognition accorded under any of the provision of Section 3. Also where such consent or recognition has been qualified with any conditions, the Central Government has the discretion to vary all or any of those conditions. But before this revocation, or as the case may be, variance, the concerned company has got to be afforded a reasonable opportunity of showing the cause why such order should not be made [Sub-section (6) together the proviso].

In a case where an order has been made under sub-section (6), the Central Government must, upon the request of the company concerned, communicate to it in writing the reasons for such order [Sub-section (7)].

Even in the matter of advertisements, the Central Government indirectly exercises control over a company, as would be evident from the provisions of Section 4. According to the Section, a person cannot circulate any offer, being a public offer, in the States for the subscription, or purchase of any securities without the consent or recognition being obtained from the Central Government for issuing or creating such securities and without a statement being made to that effect in the offer. Further, a company shall not circulate any offer, being an offer to existing holders of the securities of that company or to existing holders of the securities of any other company specified in the offer, in the States for the subscription or purchase of any securities of such company unless recognition has been accorded by the Central Government under this Act to the issue or creation of such securities and a statement has been made to that effect in the offer. Again, no person shall, without the consent of the Central Government, circulate any offer, being a public offer, in the States for the sale of any securities issued or created with the consent or recognition of the Central Government if such issue or creation was made by a private company or if the order according consent or recognition contained a condition that the securities should be privately subscribed.

Purchase and Sale of Securities : Even in the matter of purchase and sale of securities the Central Government's consent and recognition has got to be obtained as aforesaid. By Section 5 a person is debarrd from accepting or giving any consideration for any securities in respect of an issue of capital made or proposed to be made in the States or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital. Likewise, a person is debarrd from selling or purchasing or otherwise transferring or accepting transfer of any securities issued by a company in respect of any issue

of capital made after the 7th May, 1943 in the States or elsewhere unless such issue has been made with the consent or recognition of the Central Government.

Central Government's power to exempt and to condone contraventions : Section 6 empowers the Central Government to provide, by general order, for the granting of exemption from all or any of the provisions of Sections 3, 4 & 5. This general order has to be notified in the Official Gazette.

In so far as contraventions are concerned, the Section likewise empowers the Central Government to condone the contraventions of any of the provisions of Section 3 or Section 4 or Section 5. On the making of such order, the provisions of this Act shall have effect as though an exemption had been granted as aforesaid in respect of the thing done or permitted to be done in contravention of Section 3 or Section 4 or Section 5, as the case may be.

Power to call for information : By virtue of Section 7 the Central Government may authorise any officer in this behalf for certain specific purposes. These purposes are (i) to enquire into the correctness of any statement made in an application for consent or recognition of the Central Govt. to an issue of capital; or (ii) to ascertain whether or not the requirements of any condition attached to an order according such consent or recognition have been complied with; or (iii) to obtain particulars as to the total capital issued; or (iv) for any other purpose of the Act. For any of these purposes, the authorised person may require any company or any officer of the company to submit and furnish to him within such time as may be specified in the requisition, such accounts, books or other documents and such information as he may reasonably think necessary. It may be noted that every Registrar of Companies has been authorised by the Central Government to exercise within the limits of his jurisdiction the power specified in Section 7.

However, by virtue of Section 9, person who obtains any information in terms of this Act shall not otherwise than in connection with the execution of the provisions of this Act or of any order made in pursuance thereof, disclose that information to any other person except with the Central Government's permission.

False Statements : When complying with any requisition under Section 7 discussed above) or when making any application for the consent or recognition to an issue of capital, a person must not give any information or make any statement which he knows, or has reasonable cause to believe, to be false or not true in any material particular.

Power to delegate function : The Central Government may, by order direct that any power or duty which by or under any of the preceding provisions of this Act is conferred or imposed on the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer, subordinate to that Government (Section 10).

Under Section 11, the Central Government shall, by notification in the Official Gazette, constitute an Advisory Committee. The Committee shall consist of

not more than 5 members and may from time to time refer to it for advice any such matters arising out of the administration of this Act as the Central Government may think fit.

Power to make Rules : The Central Government has assumed power to make Rules. Under Section 12, it may make rules for carrying out the purpose of this Act and in particular for the levy of fees on applications made to the Central Government for its consent. All rules made under this Section shall be laid for not less than 30 days before each House of Parliament as soon as possible after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

Penalties (Section 13) : Whosoever contravenes or attempts to contravene any of the provisions of this Act or of any order made thereunder shall be punishable with imprisonment for a term which may extend to one year or with fine or with both. If, however, the defaulter punishable under this Section is a company or other body corporate, then every Director, Manager, Secretary or other Officer thereof shall be guilty of such offence. However, such Director, Manager etc., may absolve himself from the offence if he proves : (i) that the offence was committed without his knowledge; or (ii) that he exercised all due diligence to prevent this commission.

As regards the burden of proof, where a person is prosecuted for the contravention of any provision of this Act or of any order made thereunder which prohibits him from doing an act without the consent or permission of any authority, he will have to prove that he had the requisite consent or permission. In other words, the burden of proof on the offender (Section 14).

Protection of action taken under the Act (Section 15) : No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done under this Act or any rule or order made thereunder.

THE CAPITAL ISSUES (EXEMPTION) ORDER, 1969

It may be recapitulated that by virtue of Section 6 of the Capital Issues Control Act, 1947, the Central Government is empowered to provide for granting of exemption from all or any of the provisions of Section 3, 4 and 5. In exercise of this power the Central Government has made the order under the name and style of the Capital Issues (Exemption) Order, 1969.

Interpretation : In this Order unless the context otherwise requires :

(a) 'Act' means the Capital Issues (Control) Act:

(b) 'Banking Institution' means any institution carrying on the business of the banking to which the Banking Regulation Act 1949 applies whether fully or partially;

(c) 'Consideration involved' means—

(i) in relation to the issue of *securities without a nominal value* the amount to be raised by the issue of securities, and in the case of *securities with a normal value*, the sum of the total nominal value and

of any premium, entrance fee or other payment which the person subscribing to the securities may be called upon to pay ; and

(ii) in relation to the borrowing of money, the amount of money to be borrowed.

(d) 'Insurance company' means any insurer being a company which may be wound-up under the Companies Act, 1956;

(e) 'Banking company', 'insurer' and 'provident society' shall have the meanings respectively assigned to them in Section 5(c) of the Banking Regulation Act and Section 2 9) and 65(1) of the Insurance Act, 1938;

(f) Words and expressions used in this order and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

List of Exempted Issues of Securities under the Order 1969 from the Provisions of Section 3, 4 and 5 of the Capital Issues (Control) Act.

(1) Under Clause 3, subject to Clause 9 of the Order the following issues of securities irrespective of the value of consideration involved, by the under-mentioned categories of companies shall be exempted :

(a) a private company as defined in Section 3(1)(iii) of the Companies Act, 1956 and which is not registered under 26 of the MRTP Act;

(b) a Government Company as defined in Section 617 of the Companies Act, provided that no portion of the issue of securities is made to the general public:

(c) a banking company or an insurance company or a provident Society incorporated as a company; provided that if the total issue of capital in a period of 365 days exceeds Rs. 50 lakhs, the companies mentioned above shall, as soon as the issue has been made, send a report thereon in duplicate, to the Controller of Capital Issues to the extent applicable, in the prescribed Form 1. This report has to be followed by reports as on 31st March, 30th June, 30th September, and 31st December until the securities have been got fully paid-up, together with a copy of the audi-tied and published balance sheet immediately after the securities have been fully paid up.

2. Further, under clause 4 the following issues by public limited companies and private companies registered under Section 26 of the MRTP Act are exempted :

(a) the issue of securities by a company other than one registered under Section 26 of the MRTP Act and all transactions relating thereto, if the value of the consideration involved in any previous issue of securities made by such company within 12 months immediately preceding such issue, does not exceed Rs. 50 lakhs. This limit has reference to the total value of all the issues and transactions during any period of 12 months

but not to the value of each individual issue or transaction or to any part thereof, or to the value of consideration received from any single party;

(b) the issue of securities for the purpose of sub-dividing any securities into securities of any small denomination or consolidating any securities into securities of any large denomination. However, in either case, the transaction must not involve any increase in the total value of the paid-up capital of the company and that the securities sub-divided or consolidated are of the same kind;

(c) the issue of securities in case where—(i) an amalgamation of two or more companies (other than banking companies) has been notified by the Central Government by an order under Section 396 of the Companies Act; or (ii) an amalgamation of banking companies has been approved by the R B I. under Section 44A of the Banking Regulation Act and the total paid-up capital of the amalgamated company has not exceeded the total paid-up capital of the amalgamating companies;

(d) the loans granted or debentures taken up or bonds or promissory notes issued by the Central Government, a State Government and various financial institutions. The term 'debenture' includes any debenture which is, at the option of the holder, convertible into equity capital of the issuing company by virtue of a condition contained in the issue of such debenture to any institution mentioned herein ;

(e) the guarantee given by I.D.B.I , I.F.C., Central Government or a State Government, Export-Import Board of India, or any other guarantee given or furnished by any other body or institution ;

(f) the issue and acceptance of securities, other than debentures, being an issue made by a company in the ordinary course of its business and solely for the purpose of that business, to a banking institution or its nominee in respect of advances or overdrafts or guarantees granted or furnished by such banking institution ;

(g) instrument executed by Central or State Government guaranteeing advances or overdrafts or guaranteeing the payments due to a banking institution arising out of any guarantee furnished by that banking institution ;

(h) the issue and acceptance of debentures being an issue made to banking institution or its nominee, if the total value of such debentures together with the value of any previous issue of such debentures within 12 months immediately preceding such issue does not exceed Rs. 50 lakhs.

(i) third party guarantee in respect of (d) and (f) above.

(j) charge made under mining leases in favour of lessors charging the assets of a company for the due payment of rents and royalities reserved by the lease instrument.

3. Under clause 5, the issue of securities, other than debentures, for consideration exceeding Rs. 50 lakhs proposed to be made by a company (not including a company registered under Section 26 of the MRTP Act but including a Government company as defined in Section 617 of the Companies Act, 1956), which proposes to make an offer of the securities to the public by prospectus shall be exempted from the provisions of Sections 3, 4 and 5 of the Act. This exemption would be available only on the fulfilment of the following conditions, nemely—

(i) That the issue does not comprise or include preference shares carrying rights of participation over and above the fixed amount or an amount calculated at a fixed rate in the profits or conversion into equity shares or debentures carrying right of conversion into equity shares or payable to bearer.

(ii) That as a result of the proposed issue, the equity of the company is less than one half of its debt. 'Debt' includes all borrowings repayable not earlier than 5 years from the date of borrowing (whether debentures, loans or deferred payment including interest thereon for the purchase of capital equipment) and preference shares redeemable not later than 12 years from the date of issue. 'Equity' includes paid-up equity share capital, share premium, free reserves, irredeemable preference shares and preference shares redeemable not earlier than 12 years from the date of issue;

(iii) That as a result of the proposed issue, the total paid-up preference shares capital will not be more than 1/3rd of the total paid up equity share capital;

(iv) That where the securities issued by the company, or a part thereof, is for the purpose of taking over an existing business or assets, the take-over is effected at the book value of such business or asset;

(v) That where a public company is formed on conversion of a private company or for taking over the business of a partnership or a proprietorship, or an association of persons, the consideration for issue of securities by the public company (to the shareholders of such private company or to the members of such partnership, proprietorship or an association of persons, as the case may be,) for taking over the same as a going business and any part of the assets of such private company, partnership, proprietorship or an association of persons does not exceed the book value of the net assets so taken over of the private company, partnership, proprietorship or an association of persons. In other words, the consideration paid for the conversion or take-over through the issue of security should not exceed the book value of net assets taken over of the aforesaid entities. Further, it should be ensured that any part of the assets of such entities does also not exceed book value of the net assets taken over;

(vi) That no securities are issued in consideration of revaluation of assets or creation of any intangible or fictitious assets;

(vii) That the issue price of the securities to be issued is at par not at a premium or discount.

(viii) That offer of securities for public subscription is such as to make the securities eligible for listing on a recognised stock exchange;

(ix) The rate of dividend on preference shares does not exceed the rate notified by the Central Government from time to time as applicable to such securities and the timing of the offer of securities proposed to be issued in conformity with the directions notified by the Central Government at the beginning of each calendar year;

(x) That where the issue of equity capital involves an offer for subscription by the public for the first time, the value of equity capital subscribed privately by the promoters, directors and their friends is not less than 15%, of the total issued equity capital, if it does not exceed Rs. 1 crore, 12½%, if it does not exceed Rs. 2 crores and 10%, if it is in excess of Rs. 2 crores.

(xi) That in public offer of shares, no reservation is to be made in favour of any person or class of persons except with the prior approval of the Controller of Capital Issues;

(xii) That if the consideration for the issue of securities is proposed to be got fully paid-up by making calls, such calls shall be made on a uniform basis on all securities falling under the same class and completed within a period of 5 years from the date of the offer ;

Provided further that—

(i) a company satisfying the criteria under the above proviso [i e. (i) to (xii)] shall file with the Controller of Capital Issues a statement of its capital issue proposals in the form specified in the Schedule annexed to the Capital Issues (Application for consent) Rules, 1966, notified under No. G S.R. 600 dated 29th March, 1966 together with the enclosures mentioned therein, except the treasury challan at least 30 days before a prospectus is issued, a statement in lieu of prospectus is filed or any offer relating to the whole or part of the issue is made;

(ii) the company shall obtain an acknowledgment in Form II as specified in

the Schedule annexed to this Order duly signed by the Controller of Capital Issues or an officer authorised by him in this behalf:

(iii) the company shall state in a prominent place in its prospectus or statement in lieu of prospectus or letter of offer to its shareholders, as the case may be, that the issue of securities is being made in terms of the provisions of this Order;

(iv) as soon as the issue of capital has been made, a report thereon is sent in duplicate to the Controller of Capital Issue, to the extent applicable in Form I as specified in the Schedule annexed to this order, to be followed by reports as on 31st March, 30th June, 30th September and the 31st December until the securities have been got fully paid up together with the copy of the audited and published balance-sheet immediately after the securities have been fully paid up.

Schedule : The Schedule and Form referred to above are appended below :

FORM 1

Report to be sent in duplicate to the Controller of Capital Issues

1. Name of the company.....

2. Amount of issue—(i) Equity shares Rs..... (ii) Preference Shares Rs.....(iii) Debentures Rs.....(iv) Loans, etc. Rs.....

3. Issue made by the Company—

Type of issue	*Date of Issue*	*Amount*	*Type of Security*
(a) "Rights" issue other than Bonus	.....	.....	.....
(b) Firm allotments.....	.....	.....	.....
(c) Offer to the public by prospectus	.....	.....	.....
(d) Loans, etc.....	.....	.....	.....

4. Amount underwritten :—

Name of the underwriter	Type of security underwritten	Amount

5. Applications received in respect of offer of shares made to the general public by prospectus (two copies which should be enclosed) under item 3(c) above and the result of subscription.

	Kind of security	*No. of application*	*No. of shares*	*Amount of subscription*
(i) Applications received in respect of offer to the public	.....	.....	.....	.....
(ii) Applications rejected	.....	.....	.....	.....
(iii) Valid applications considered from the public for allotment	.....	.....	.....	.....
(iv) Allotments made in respect of (iii) above	.....	.....	.....	.....
(v) Allotments to underwriters under underwriting obligations other than firm allotment	.....	.....	.....	.....

6. [Issues taken up and or allotments made for the period under reports;

Particulars of allotment	*Date(s) of allotment*	*Equity shares*	*Preference shares*	*Debentures*
		subscribed/ paid-up	*subscribed/paid-up*	
(i) "Right shares other than Bonus shares. (a) Existing residents. (b) Existing non-residents.				
SUB-TOTAL				
(ii) Firm allotments. (a) Foreign collaborators (b) Promoters, directors, their friends and relatives (c) Financial institutions (d) Central and State Governments (e) Brokers and underwriters other than item (iii)(a) below (f) Existing shareholders and others				
SUB-TOTAL				

(iii) Allotment of shares offered to the general public by prospectus.

(a) Directors

(b) Financial Institution (names of the financial institutions)

(c) Central and State Governments

(d) Underwriters under underwriting obligation

(e) Cost registered under the Companies Act

(f) General public

Grand Total (i), (ii) and (iii)

(iv) Loan Capital
Date of creation of charge on the assets and amount of charge.

7. Total capital raised up to the end of this report :—

	Subscribed	*Paid-up*	*Debentures, Loans of*
Equity shares			
Preference shares			

Signature of the person submitting the report

Note :—(i) The reports are to be made in respect of capital issued, in accordance with the Statement of proposals. The reports should be filed at the end of each of quarter as at 31st March, 30th June, 30th September, and 31st December, until the capital has been fully subscribed and paid-up (ii) A copy of the balance-sheet and Profit and Loss Account of the accounting year in which the capital has been fully subscribed and paid-up, should be filed Subsequent reports, however, need not be sent if the capital issued has been fully subscribed and paid-up. Subsequent to the filing of the Balance-Sheet and Profit and Loss Account no report need be sent.

FORM II

Acknowledgment

To

.....

.....

Subject... .....

Dear Sir/Gentlemen,

I am directed to acknowledge receipt of the Statement of proposals of Messrs..... ...in regard to the proposed issue of securities of the value of Rs.....(Rupees.....) in the form of equity/preference shares/secured loans under the authority of the Capital Issues (Exemption) Order, 1969.

I am to invite attention of the company to items (iii) and (iv) of the second proviso to clause 5 of the Capital Issues (Exemption) Order, 1969, and to request that the company may ensure due compliance of the requirements mentioned therein, namely :

(i) in any prospectus or letter of offer, the company may disclose that the issue is being made in terms of the Capital Issues (Exemption) Order. 1969; and

(ii) that after the issue, reports of the subscriptions to the scheme offered may be made within the stipulated date at the prescribed intervals of the subscription to the securities offered.

Controller of Capital Issues

Notification No. S.O. 559, dated 1st Feb., 1969.

In pursuance of sub-clause (ix) of clause 5 of the Capital Issues (Exemption) Order, 1969, published with the notification of the Government of India in the Ministry of Finance (Department of Economic Affairs) No. S.O. 558, dated the 1st February, 1969, the Central Government hereby notifies the following rates for the purposes of the said sub-clause, namely—

(1) the rate of dividend on preference shares to be issued under the authority of the said Order shall not exceed 9.5 per cent per annum (free of company's tax but subject to deduction of taxes at prescribed rates);

(2) the rate of interest on debentures, bonds, etc., to be issued under the authority of the said order shall not exceed 7.75 per cent per annum.

Notification No. S.O. 560, dated 1st February, 1969.

In pursuance of sub-clause (ix) of clause 5 of the Capital Issues (Exemption) Order, 1969 published with the Notification of the Government of India in the Ministry of Finance (Department of Economic Affairs) No. S.O. 558, dated the 1st February, 1969, the Central Government hereby directs that during the

calendar year 1969, no offer of securities of a nominal value of Rs. 250 lakhs or above (exclusive of the amounts to be subscribed by the Government and non-residents) by a public limited company shall be made or kept open during the period the 1st June to 31st August (both days inclusive) without obtaining the prior permission of the Central Government as to the timing of the offer.

Exemption of public offer for sale of certain securities from certain provisions of the Act (Clause 6) : The following securities are exempt from the provisions of Section 4 of the Act in so far as such provisions relate to any documents publicly offering for sale namely :

(a) Any security issued in the State before 17th May, 1943 ;

(b) Any security issued outside the State before that date, being a security of a class of which no further issue has been made after that date by or on behalf of the same company without the consent or recognition of the Central Government.

Exemption of certain securities, the issue of which have been regularised (Clause 7) : The following securities are exempt from the provisions of Section 5 (2) of the Act, namely :

(a) The securities, the issue of which has involved a contravention of Section 3 (1), (2) and (3) or Section 4 of the Act, if such contravention has been condoned under the provisions of Section 6 (2) of the Act ;

(b) Any security transferred by the operation of the law of inheritance or succession or by the decree of a competent Court.

Clarification (Clause 9) : It has been clarified that all issues of securities not covered by this Order and, in particular, the following issues of securities are not exempt from the provisions of Sections 3, 4 and 5 of the Act, namely :—

(i) Bonus issues as referred to in Clause 8 (1) of this Order by any company whatsoever — Private Company, Banking and Insurance Company, Government Company and Public Company - irrespective of the amount of consideration involved ;

(ii) Issue of Preference shares carrying participating or conversion rights ;

(iii) Issue of securities by Private Limited Company in which an amount exceeding 20% is subscribed by a Public Company or Companies ;

(iv) Issue of debentures carrying conversion right other than those mentioned in sub-clause (iv) of Clause 4 or issue of debentures not payable to registered holders ;

(v) Issue of securities at a premium or discount ;

(vi) Issue of securities involving relaxation of any or all the conditions mentioned in Clause 5 above.

Saving (Clause 8) : The provisions contained in the Capital Issues (Exemption) Order, 1969 shall not :

(i) apply to any issue of securities irrespective of the amount involving the capitalisation of profits or reserves for the purpose of issuing additional capital or conversion of partly paid-up shares into fully paid-up shares or for the increase of the paid-up value or par value of shares already issued by any company private or public including a banking company or an insurance company or a provident society incorporated as a company ;

(ii) affect or be deemed to affect the power of the Central Government to modify in the public interest any proposal for the issue of securities by a public company desiring to avail itself of the exemption under this Order ;

(iii) be deemed to exempt any public company from obtaining the consent of the Central Government under the Act in respect of issues of all securities, the terms of which, for whatever reasons, do not satisfy the provisions of Clause 5.

THE CAPITAL ISSUES (APPLICATION FOR CONSENT) RULES, 1966

It has been stated earlier in the Study Paper that the Central Government has assumed under Section 12 of the Capital Issues (Control) Act, 1947 the power of making Rules for carrying out the purpose of this Act and in particular for the levy of fees on application made to the Central Government for its consent. In exercise of this power the Central Government has since made the following rules :

Application for issue of Capital (Rule 3) : All applications for the issue of capital under the Act other than the securities exempted from the provisions of Sections 3 4 and 5 of the Act by the Capital Issues (Exemption) Order 1969, have to be made to the Controller of Capital Issues, Ministry of Finance, New Delhi, in consonance with the requirements laid down in the questionnaire specified in Schedule A annexed to this Rule in the case of issue of securities other than bonus shares and in Schedule B annexed to these rules in the case of bonus shares. [For these schedules students may refer to the Guide to the Companies Act by A. Ramaiya 10th Edition, 1984].

Fees payable on application (Rule 4) : Every application under these rules for consent for issue of capital upto the value specified hereunder :

(a) For each application for consent upto and including Rs 10 lakhs.	—Rs. 100
(b) For each application exceeding Rs. 10 lakhs.	—Rs. 100 for the first Rs. 10 lakhs + additional amount of Rs. 100 for every increase of 10 lakhs of rupees or part thereof, subject to a maximum limit of Rs. 1,500.

The amount of fee has to be tendered to the Office of the Controller of Capital Issues, in the form of a Demand Draft on the State Bank, Central Secretariate Branch, New Delhi in favour of the Controller of Capital Issues, Ministry of Finance, New Delhi. The Demand Draft must be crossed as 'account pay only'. Under Rule 6 such application must not be entertained if it is not accompanied by sufficient proof of the payment of the fee mentioned in Rule 4.

Contents of Application (Rule 5) : The aforesaid application must include a request asking for—

(i) the consent of the Central Government to the issue of capital under the provision of the Act ;

(ii) any alteration in the terms and conditions of a consent previously given by the Central Government to any extension of the period of validity for which such consent was given ;

(iii) the regulation of issue of any capital made without prior consent of the Central Government ;

(iv) the consent of the Central Government under the Act in respect of any matter not specifically mentioned in any of the foregoing clauses of this Rule.

The following is the list of certain guidelines issued by the Controller of Capital Issues.

I. **Guidelines for Issue of Fresh Share Capital :** Under the Capital Issues (Control) Act, 1947 all companies whose issue of share capital is not specifically excluded by the Capital Issues (Exemption) Order, 1969, are required to obtain the approval of the Controller of Capital Issues in the form of a letter of acknowledgment or a consent. The guidelines for the examination of issue of Share Capital other than Bonus Shares are indicated below for the guidance of such companies :

(1) All applications should be submitted to the Controller of Capital Issues in the prescribed form duly accompanied by a Demand Draft (in favour of Controller of Capital Issues, payable at the SBI, Central Secretariat Branch) for fees payable under the Act.

(2) The applications should be accompanied by a true copy of the Industrial Licence, wherever necessary, or registration with the Director General, Technical Development, for the project.

(3) A realistic estimate of the project cost will be furnished together with the precise scheme of finance. In respect of financial assistance from the financial intitutions, cop es of their letters indicating their participation in the financing of the capital cost should be forwarded.

(4) Where issue of substantial amount, is proposed to be made or where listing is a requirement of the financial institutions providing assistance, the company should have the shares issued to the public and listed in

one or more recognized Stock Exchanges except in case of listed company where it is proposed to issue as "Right Shares".

(5) Where the issue of equity capital involves an offer for subscription by the public for the first time, the value of equity capital, subscribed privately by the promoters, directors and their friends shall not be less than fifteen percent of the total issued equity capital, if it does not exceed one crore of rupees, twelve and a half per cent, if it does not exceed two crores of rupees and ten per cent, if it is in excess of two crores of rupees.

(6) Ordinarily issue of shares for consideration other than cash is not permitted. In exeptional cases where the parties desire that shares should be allowed in lieu of the assets transferred, detailed information in regard to the valuation of such assets together with the copies of necessary valuation reports be furnished.

(7) In case of companies registered under the M R.T.P. Act, they are advised to ensure that the requisite approval under the M.R.T.P. Act has been obtained before making an application to the Controller of Capital Issues.

(8) To finance the Capital cost of the project, the capital structure should be such that an equity debt ratio of 1:2 is considered fair and reasonable. In case of capital intensive industries, a higher equity debt ratio can be considered on merits of each case.

(9) An equity preference ratio of 3:1 is normally permitted.

(10) The rate of dividend on preference shares should be within the ceiling as notified by the Controller of Capital issues from time to time.

(11) No premium is allowed in respect of a new company making its first issue of shares.

(12) There should be satisfactory underwriting arrangements in respect of new issues and the names of underwriters together with the amounts underwritten should be indicated in the application, except in case of "Right Shares".

(13) No company is expected to make an allotment of shares to non-resident except with the prior approval in writing of the Government of India or Reserve Bank of India and a copy of such approval should be attached to the application if the shares are proposed to be allotted to non-residents.

(14) If any firm allotment is intended to be be given in favour of the public

financial institutions, the particulars thereof should be furnished in the application.

(15) Any arrangement reached by the company or commitment made prior to the issue of capital which has a significant impact on the capital cost estimate or the capital structure of the company the same may be disclosed along with the application.

(16) A certificate duly signed by the Secretary and/or Director of the company stating that the information furnished is complete and correct be annexed to the application. Similarly, a certificate from the Auditors of the company stating that the information in the application has been verified by them and is found to be true and correct to the best of their knowledge and information, be furnished.

Additional Guidelines

(17) An official press release says that companies before making an application to the Controller of Capital Issues for issue of right shares shall give in a letter to the existing shareholders detailed information as to how they propose to utilise the additional money and give some broad ideas of the future earning after the investment of such additional capital. This information will enable the shareholders to decide well in advance whether they should subscribe or not to the right issue [Press Note by the Ministry of Finance, Department of Economic Affairs issued by the Controller of Capital Issues on 13 8.76].

II. Guidelines for issue of bonus shares—Revised. (As Revised on 8th August 1981)

Under the Capital Issues (Control) Act, 1947, all companies are required to obtain the approval of the Controller of Capital Issues for issue of bonus shares. Detailed guidelines for the examination of bonus issue proposals were last published in November 1975. The Government, having reviewed the present guidelines, revised them in certain respects. The salient features of the revised guidelines are given below:—

(i) The residual reserves after the proposed capitalisation to be maintained has been raised from 33.1/3 per cent to 40 per cent of the increased paid-up capital.

(ii) 30 per cent of the average profits before tax of the company for the previous three years should yield a rate of dividend on the expanded capital base of the company at 10 per cent instead of 9 per cent as was the case prior to the revision.

(iii) Instead of the three timing tests now followed, it has been decided that the company should make a further application for issue of bonus shares only after 36 months have elapsed from the date of sanction by the Government of an earlier bonus issue by the company, if any. Application for issue of bonus shares should also be made within one month of announcement of bonus by the Board of Directors of the company.

(iv) The companies making bonus issue proposal shall produce satisfactory evidence that they have not defaulted in respect of payment of statutory dues of the employees, such as contribution to provident fund, gratuity, bonus etc.

(v) In a case where there is a default in the payment of term-loans outstanding to any public financial institution, the company proposing the bonus issue shall produce a no-objection letter from the concerned financial institution in respect of the proposed bonus issue.

The revised guidelines are reproduced below :—

1. There should be a provision in the Articles of Association of the company for capitalisation of reserves etc., if not, the company should produce a Resolution passed at the General Body meeting making provisions in the articles of Association for capitalisation.

2. Consequent to the issue of Bonus shares if the subscribed and paid-up capital exceeds the authorised capital, a Resolution passed at the General Body Meeting in respect of increase in the authorised capital is necessary.

3. The company should furnish a Resolution passed at General Body meeting for bonus issue before an application is made to the Controller of Capital Issues. In the General Body Resolution the management's intention regarding the rate of dividend to be declared in the year immediately after the bonus issue should be indicated.

4. The bonus issue is permitted to be made out of free reserves built out of the genuine profits or share premium collected in cash only.

5. Reserves created by revaluation of fixed assets are not permitted to be capitalised.

6. Development Rebate Reserve/Investment Allowance Reserve considered as free reserve for the purpose of calculation of residual reserves test.

7. All contingent liabilities disclosed in the Audited Account which have bearing on the net profits, shall be taken into account in the calculation of the minimum residual reserves.

8. The residual reserves after the proposed capitalisation should be at least 40 per cent of the increased paid-up capital.

9. 30 per cent of the average profits before tax of the company for the previous three years should yield a rate of dividend on the expanded capital base of the company at 10%.

10. Declaration of bonus issue in lieu of dividend is not allowed.

11. The company may make a further application for issue of bonus shares only after 36 months from the date of sanction by the Govt. of an earlier bonus issue, if any.

12. Bonus issues are not permitted unless the partly paid shares if any existing, are made fully paid-up.

13. No bonus issue will be permitted if there is sufficient reason to believe that the company has defaulted in respect of the payment of statutory dues of the employees such as contribution of provident fund, gratuity, bonus, etc.

14, Capital Reserves appearing in the Balance Sheets of the companies as a result of revaluation of assets or without accrual of cash resources will neither be allowed to be capitalised nor taken into account in the computation of the residual reserves of 40% for the purpose of bonus issue.

15. At any one time the total amount permitted to be capitalised for issue of bonus shares out of free reserves shall not exceed the total amount of paid-up equity capital of the company.

16. Applications for issue of bonus shares should be made within one month of the bonus announcement by the Board of Directors of the company.

17. In cases where there is any default in the payment of any term loans outstanding to any public financial institutions a no-objection letter from that institution in respect of the issue of bonus shares should be furnished by the companies concerned with the bonus issue application.

All applications for bonus issue should be signed by a person not below the rank of Director/Secretary together with a certificate as follows :

I, Shri.....in my capacity as..... ....solemnly affirm that the facts stated above are true to the best of knowledge and nothing has been withheld.

Signature.....

Name in Capital Letter.....

.....

Principal officer of the company.

A certificate from the Auditors of the company in the proforma as under shall also be furnished :—

"We have verified the information furnished by the company for issue of bonus shares and find the same as correct. We also certify that we have received all the information required by us for verification.

We hereby certify that the proposal contained in the application for the issue of bonus shares meets all the requirements of the bonus guidelines, including the guidelines contained in paragraphs 8, 9, 11 & 13 in force issued by the Government in this regard according to the information furnished to us and to the best of our knowledge."

Signature.....

Auditors.

III. Guidelines for issue of debentures by public limited companies.

These guidelines are issued in supersession of the guidelines issued by Government on the 27th October, 1980.

1. *Applicability* : The guidelines will apply to issue of secured convertible as well as non-convertible debentures by public listed companies.

2. *Objects of Issue* : The object of the issue can be either to raise long-term funds for the financing of any expansion or diversification project or to augment the long-term resources of the company for working capital requirements.

3. *Quantum of Issue* : The amount of issue of debentures in the case of working capital requirements shall not exceed 20 per cent of the gross current assets, loans and advances. The amount of issue of debentures for project financing will be considered on the basis of the approvals of the scheme of finance by the financial institutions/Government under the provisions of the M.R.T.P. Act, etc.

4. Debt-Equity ratio : The debt-equity ratio, including the proposed debenture issue shall not normally exceed 2:1. For this purpose—

   'debt' will mean all term loans, debentures and bonds with an initial maturity period of five years or more, including interest accrued thereon It also includes all deferred payment liabilities but it does not include short-term banks borrowings and advances, unsecured deposits or loans from the public, shareholders and employees, and unsecured loans or deposits from others. It should also include the proposed debenture issue.
   'Equity' will mean paid-up share capital including preference capital and free reserves.

   Note : 1. The computations under guidelines 3 and 4 mentioned above will be based on the latest available audited Balance sheet of the company.

   2. A relaxation in the norm of debt-equity ratio of 2:1 will be considered favourably for capital intensive projects such as fertilisers, petro-chemicals, cement, paper, shipping, etc.

5. *Interest rate* : In the case of convertible debentures the rate of interest shall not exceed 13.5% per annum. In the case of non-convertible debentures the rate of interest shall not exceed 15% per annum.

6. *Period of Redemption* : The debentures shall not be redeemable before the expiry of a period of seven years.

7. *Price at the time of Redemption* : A premium up to 5% of the face value can be allowed at the time of redemption in the case of non-convertible debentures only.

8. The face value of the debentures will ordinarily be Rs. 100 each.
9. The debentures shall be listed on the Stock Exchange.
10. Only secured debentures will be permitted for issue to the public.
11. The issue of debentures shall be underwritten. A relaxation is permitted in this regard if the Controller of Capital Issues is otherwise satisfied that the issues need not be underwritten.
12. The shares of the company proposing to issue the debentures must be listed in one or more stock exchanges and the market quotation of its equity shares must have been at or above par value during the six months prior to the date of application for issue of debentures.

Choice of issue of convertible/non-convertible debentures : In case a company issues convertible debentures, it will be benefited in the following ways :

1. The average cost of capital will be comparatively less. According to the latest guidelines for the issue of convertible debentures, the company can pay a maximam rate of interest of 13.5% on convertible debentures. whereas in the case of non-convertible debentures, the company may have to pay even upto 15%. Moreover, in case of non-convertible debentures, the company may have also to pay 5% premium on redemption. This is not needed in case of convertible debentures.
2. It will be easier for the company to attract investors because they will have an opportunity to share in the future growing profitability of the company. Moreover, convertible debentures are more liquid than non-convertible because of greater marketability.
3. The investors will have an opportunity to reap benefits by way of capital appreciation of their investments.
4. In the initial years, the company will have to pay a fixed rate of interest. This will ensure minimum return to the investors as well.
5. By issuing convertible debentures the company can ensure higher price of equity shares in future. From the point of view of the shareholders, they may be interested in the convertible debentures of a profitable business, because they will be able to acquire the shares of the company comparatively at a lower price.
6. The company's debt-raising capacity will again be revived in future to the extent debentures are converted into equity shares.

However if the company issues convertible debentures, the control of the existing shareholders of the company will be diluted to some extent *Assuming that the company can tolerate this. it should raise the required funds by the issue of convertible debentures to the extent permissible under the guidelines issued by the Government of India for issue of debentures.

If the company issues non-convertible debentures, as already pointed out, it will have to pay higher rate of interest. In an economy where many companies are competing for the same funds, investors will not be attracted easily to non-convertible debentures, if they can get convertible securities of profitable com-

panies. In the case of non-convertible debentures, debentureholders do not have any opportunity of capital appreciation of their investment by sharing in the future profits of the company.

In the light of the above it is recommended that the company should issue convertible debentures.

IV. **Guidelines for Issue of "Right" Debentures by Public Limited Companies for Working Capital Requirements effective from October 1980.**

1. *Objects of Issue* : The guidelines will apply only to those issues of secured debentures by listed companies to the public. The object of the issue can be either to raise longterm funds for the financing of any expansion or diversification project. or to augment the long-term resources of the company for working capital requirement.

2. *Quantum* : The amount of debentures, in the case of working capital requirements, shall not exceed 20 per cent of the gross current assets, loans and advances. The amount of issue of debentures, for projects financing will be considered on the basis of the approvals of the scheme of finance by the financial institutions/Government under the MRTP Act, etc.

3. *Debt-equity ratio* : The debt-equity ratio, including the proposed debenture issue, shall not exceed 2:1.

Note : For this purpose—

(i) "debt" will mean all term loans, debentures and bonds with an initial maturity period of five years or more, including interest accrued thereon. It also includes all deferred payment liabilities, but it does not include short-term bank borrowings and advances, unsecured deposits or loans from the public, shareholders and employees, any unsecured loans or deposits from others. It should also include the proposed debenture issue.

(ii) "equity" will mean paid-up share capital including preference capital and free reserves;

(iii) the computations under guidelines at serial Nos. 2 and 3 will be based on the latest available audited balance sheet of the company, a relaxation in the norm of debt-equity ratio of 2 : 1 will be considered favourably for capital intensive projects, such as fertilisers, Petro-chemical, cement, paper, shipping, etc.

4. *Interest rate* – The debentures shall carry a rate of interest not exceeding 13.5 per cent per annum. However, in order to make the debentures more attractive to the prospective investors, it is open to the company to offer suitable incentives like the issue of debentures at a discount, or, payment of an additional interest of, say, up to 1 per cent for any year if in that year the company declares dividend on its equity at a rate exceeding previously established rate (e.g., the highest rate of dividend declared in the three years preceeding the debenture issue).

5. Period The debentures shall not be redeemable before the expiry of a period of seven years.

6. The face value of the debentures will ordinarily be Rs. 100 each.

7. The debentures shall be listed on the stock exchange.

8. The company proposing to issue the debentures to the public should be a listed one and its equity shares must have been quoted on the stock exchange at or above the par value during the six months prior to the date of application for issue of debentures.

9. The issue of debentures shall be underwritten. A relaxation is permitted in this regard if Controller of Capital Issues is otherwise satisfied that the issue need not be underwritten.

10. Only secured debentures would be permitted for issue to the public.

Check-list—Working-sheet Under the Capital Issues (Control) Act, 1947

Section	*Subject matter*	*Compliance*	*Documents*
(1)	(2)	(3)	(4)
3, 4 & 5	Issue of Fresh Share Capital	Whether the issue of shares was within the limits of authorised capital ? If not, whether memorandum altered to increase the authorised capital ? Whether the Board/general meeting resolution passed for issuing capital ? Whether the company had complied with the guidelines regarding issue of fresh share capital ? If right shares : Whether company had obtained necessary approval of general meeting under section 81 of the Companies Act, 1956 ? If the issue is open to non-residents whether approval of the RBI had been obtained ? Whether clearances, if any, had been obtained under Companies Act, MRTP Act, I(D&R) Act,/ FERA ? Whether the company had filed the application (in quadruplicate) in the form of a letter for consent with the Controller of Capital Issues as prescribed in Schedule A to the Capital Issues (Application for Consent) Rules, 1966, along with the annexures specified therein ?	1. Memorandum and Articles 2. Minutes of Board/ General Meeting 3. Copy of the application form 4. Approval from Controller of Capital Issues and other authorities 5. Register of Members 6. Prospectus 7. Annual Report 8. Guidelines and Notifications 9. Relevant files

(1)	(2)	(3)	(4)
		Whether the time period mentioned in the Consent Order and conditions imposed by the Controller, like, submission of quarterly reports, had been complied with ? If the issue was covered under the Capital Issues (Exemption) Order, 1969 check whether : —a statement of capital issue proposal (in duplicate) in the form given in Form 1 of the Schedule to the Capital Issues (Exemption) Order, along with necessary annexures to the Controller of Capital Issues ? —the acknowledgement in Form II of the Schedule to the Capital Issues (Exemption) Order had been obtained from the Controller of Capital Issues ? —follow-up action had been taken, like submission of initial and quarterly reports to the Controller of Capital Issues in Form I?	
3, 4 & 5	Issue of Bonus Shares	Check whether : —the articles permit capitalisation of profits and reserves ? If not whether articles had been altered ? —the issue was within the limit of authorised capital ? If not, whether memorandum altered ? —the Board resolution had been passed approving issue of bonus shares ? —general body had passed the resolution which should specify the management's intention regarding the rate of dividend to be declared in the year immediately after the bonus issue ?	1. Memorandum and Articles 2. Minutes of Board/ General Meeting 3. Application form 4. Register of Members 5. Approval from Controller of Capital Issues 6. Annual Report

(1)	(2)	(3)	(4)
		—approval of the RBI had been obtained if the issue involved issue of shares to non-residents ? —company had complied with guidelines for issue of bonus shares ? —an application in the form of a letter in duplicate had been made to the Controller of Capital Issues along with necessary enclosures specified therein ? [Schedule B to the Capital Issues (Application for Consent) Rules, 1966] - consent obtained from the Controller of Capital issues ? —time period mentioned in the Order and conditions imposed by the Controller had been complied with ?	
3, 4 & 5	Issue of Debentures	Check whether : —the guidelines for issue of debentures had been complied with ? — the Board resolution/general meeting resolution had been passed ? —approval of the RBI was obtained if issue was open to non-residents ? —the company had filed the application (in quadruplicate) in the form of a letter for consent with the Controller of Capital Issues as prescribed in Schedule A to the Capital Issues (Application for Consent) Rules, 1966, along with the annexures specified therein ?	1. Minutes of Board/ General Meeting 2. Prospectus 3. Debenture trust deed 4. Application Form 5. Approval of the Controller of Capital Issues 6. Approval from the RBI 7. Annual Report 8. Register of Debenture holders

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FINAL COURSE (NN)

CORPORATE LAW

STUDY—XI

Contents

The Monopolies and Restrictive Trade Practices Act, 1969 [as amended by the M.R.T.P. (Amendment) Act, 1984.]

This Study covers :

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Theme of the Act

Definitions—

Agreement—Commission — Director General — Dominant Undertakings — Financial Institutions — Goods— Group — Inter-connected Undertakings—Member—Monopolistic Trade Practice—Owner—Price—Produce—Restrictive Trade Practice—Scheme of Finance—Service— Trade — Trade Association—Trade Practice—Undertaking Value of Assets

Prescribed Readings : MRTP—A Compendium by A.M Chakraborty (Taxman Publication), 1984 Edition.

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Introduction : The genesis of the M.R.T.P. Act, 1969 is traceable to the Constitution of India. The Directive Principles of State Policy, particularly, articles 38 and 39 of the Constitution, deserve special mention. Article 39 (b) enjoins upon the State to secure "that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good"; article 39 (c) directs it to ensure that "the operation of the economic system does not result in concentration of wealth and the means of production to the common detriment". The Industrial Policy Resolution of 1956 declared thus : "equally it is urgent to reduce disparities in income and wealth, which exist today, to prevent private monopolies and the concentration of economic power in different fields in the hands of small number of individuals". It was against this background that the political and economic circles in our country started feeling increasingly from 1960 onwards that the actual operation of the economic system and, particularly, industrial licencing during the 50's and 60's tended to result in greater concentration of economic power in a group of large industrial houses and that the diffusion of entrepreneurship in industry.....one of the major targets of the State policy .....was not keeping pace with industrial development. On the basis of reports of various committees, the M.R.T.P. Bill was eventually introduced on 18th August, 1967. On 27th December, 1969 the Bill became an Act which actually came into force on 1st June, 1970.

This Act is perhaps unique among all anti-monopoly or anti-trust legislation of various advanced countries, because of the emphasis laid on the necessity to curb concentration of economic power to the common detriment. This emphasis can be appreciated from the Preamble to the Act itself, which describes this piece of legislation as "An Act to provide that the operation of the economic system does not result in the concentration of economice power to the *common detriment*, for the control of monopolies, for the prohibition of *monopolistic and restrictive trade practices* and for matters connected therewith or incidental thereto".

No doubt, the preamble uses the words "common detriment" purely in connection with concentration of economic power. Nevertheless, a critical probe into the Act would reveal that some of the provisions of the Act go beyond the scope of these words For instance, Section 21 (3) (a), Section 22 (3) (a) and Section 27 (1) dealing with concentration of economic power also contain an expression "prejudicial to the public interest" independently of the consideration as to whether or not concentration of economic power to the common detriment is likely to ensue. Consequently, by virtue of these sections, the Central Government is required to consider the question of allowing or disallowing any proposal for expansion or establishment of a new undertaking or the question of ordering division of an undertaking from the point of view of concentration of economic power to the common detriment; it is also equally required to consider this question from the standpoint of prejudice that may be caused to public interest. This has to be considered quite apart from the question of concentration of economic power to the common detriment. Inasmuch as the Preamble has an interpretative value, it would seem that unless the

provisions of the Act are allowed to travel beyond the scope of the Preamble, the expression 'prejudice to the public interest' would be incapable of being so construed as to assign to it a connotation which is larger or wider than what is conveyed by the expression 'concentration of economic power to the common detriment'. In other words, other things being equal (*ceteris paribus*), an undertaking's proposal for expansion or establishment of a new undertaking cannot be rejected simply on the ground that prejudice may be caused to public interest if at the same time it cannot also be proved that concentration of economic power to the common detriment may ensue. Likewise, the division of an undertaking cannot be ordered, for the same reason, simply on the basis of prejudice to public interest unless it can also be shown that there is also concentration of economic power to the common detriment. This is so despite the fact the Section 27 (1) does not use the alternative expression 'concentration of economic power to the common detriment'; a specific reference to this expression does not seem to be necessary because of the fact that Section 27 itself falls within Part A of Chapter III which deals with concentration of economic power.

The expression in the Preamble to the Act, *viz*,, 'concentration of economic power' has not been defined by the Act but, broadly, the provisions of the Act are in consonance with the expressions used in the Preamble. In substance, 'concentration' denotes: (i) the control over material resources of the community; (ii) the possession of certain market power, dubbed as 'dominance'.

Although the Premable speaks of 'control of monopolies,' the Act nowhere directly refers to monopoly. At the most, it can be said that the Act takes cognisance of a potential situation of monopoly power, both in terms of control over the material resources of the community and in terms of control over market share. When the Preamble separately speaks of monopolistic trade practices, it indirectly takes cognisance of the existence of a monopoly as distinguished from a competitive situation. Consequently, it would appear that in so far as the provisions of the Act are concerned, the term "control of monopolies" has no independent relevance *except by way of identifying certain shades of monopoly and determining the extent* of control, if any, which can be exercised against such monopoly. For instance, the Act undoubtedly recognises the admitted monopoly arising out of the patent rights but at the same time, Section 15 of the Act clearly protects such a monopoly. In the context of control of monopolies, the control, to the extent it is provided in the Act, rather centres round the abuse of a monopoly situation than against monopoly itself. It is the behaviour of the monopolists that is sought to be prescribed and controlled. Judged from this standpoint, monopoly denotes a concept of power which manifests itself in one's power: (i) to control production, supply, etc.; (ii) to control prices: (iii) to prevent, lessen or eliminate competition; (iv) to limit technical development; (v) to retard capital investment; (vi) to impair the quality of goods. It is these powers which are sought to be curbed by the legislation as would be apparent from Sections 2 (i) and 32.

THEME OF THE ACT

At this stage, it would be worthwhile to trace broadly the theme of the Act for a clear grasp of the provisions contained therein. Primarily, the theme of the Act is as follows : (a) To prevent concentration of economic power to the common detriment and control of monopolies ; (b) To prohibit monopolistic trade practices ; and (c) To prohibit restrictive trade practices and unfair trade practices.

(a) *To prevent concentration of economic power to the common detriment and control of monopolies* : The Act seeks to achieve this aim by regulating growth of undertakings *of a particular size* or *market share*. Those business undertakings which have assets of the value of Rs. 20 crores or more are dubbed as "large business houses" (i.e., of a particular size). Undertakings with a sizeable share of the market, e.g. of 25% and above are called "dominant undertakings". The nomenclature assigned by the Monopoly Inquiry Commission to these two types of concentration is "country-wise concentration" and "product-wise concentration". Chapter III of the Act is intended to regulate the expansionary trend of any kind on the part of the aforesaid two categories of undertakings, e g., substantial expansion of production, establishment of new undertakings, amalgamation and take-over bids. Every such move has been sought to be brought under regulation by the Central Government in the Department of Company Affairs. There is a *quasi* judicial body like MRTP Commission to which reference may be made in respect of proposals for expansion by the Central Government at its discretion. The Central Government has also assumed crucial power under Chapter III to split the size of a particular business since division of undertakings in specified circumstances is statutorily permissible. The Act is not designed to cut at the root of concentration of economic power but to see that such concentration does not result in common detriment. For the governance of the regulatory provisions of Chapter III, Section 28 itself lays down the guidelines. As a matter of matter of fact, it would be improper to aver that the Act prohibits or forbids growth as such ; rather the restrictive provisions are intended to control the growth which has the propensity to lead to common detriment.

Chapter III-A has been newly added to enact restrictions on the acquisition and transfer of shares of, or by, certain bodies corporate. The existing provisions of Sections 108A to 108G of the Companies Act have been incorporated in this Chapter. Simultaneously, the corresponding provisions in the Companies Act are proposed to be omittted from that Act in due course. Under the provisions of Chapter III-A, any company to which Part A of Chapter III applies, will be required to obtain approval of the Central Government for acquisition and transfer of shares of the MRTP as well as non-MRTP companies.

(*b*) *To prohibit monopolistic trade practices* : Chapter IV deals with monopolistic trade practices resorted to by the *owners* of one or more of the monopolistic undertakings. This concept has been defined in Section 2(i) in terms of unreasonableness of prices charged, unreasonableness in preventing or lessening competition in the market, limiting technical development or capital investment to the common detriment, unreasonableness in increasing the

cost of production of any goods or increasing charges for the provision, or maintenance, of any services, etc. The remedy for dealing with such practices lies in the initiation of an enquiry at the instance of the Central Government by the MRTP Commission.

(c) *To prohibit restrictive trade practices and unfair trade practices*: Part A of Chapter V deals with matters pertaining to restrictive, trade practices by laying down the specific registrable agreements, their registration and the upkeep of the register. Part B of the Chapter, added by the 1984 Amendment Act, deals with unfair trade practices with a view to ensure consumer protection. Previously, there was no provision to protect the consumer against false or misleading advertisement or other similar unfair trade practices. These new provisions proceed on the assumption that if dealers, manufacturers or producers can be prevented from distorting competition, freedom of choice of consumers, the consumers will receive a fair deal. Now there is greater recognition that consumers need to be protected not only from the effects of restrictive practices but also from practices which are resorted to by the trade and industry to mislead or induce or dupe them. Chapter VI deals with control of certain restrictive trade practices, the main being to promote fair and free competition in the market so as to ensure fair deal to customers. For the purpose, the MRTP Commission has been vested with full power to regulate such practices through investigation and final orders thereafter. The Act also has made provision for a scheme of registration of certain agreements, pertaining to restrictive trade practices, enquiry into such practices at the instance of the Central Government, State Government, Director General of Investigation and Registration, associations of consumers and on the volition of the Commission.

The MRTP Commission is an independent. quasi judicial body bestowed with powers akin to a Civil Court under the Civil Procedure Code, 1908. It has various personnel to function through. The Commission, to regulate its own functioning, has framed the MRTP Regulations, 1974 as amended by the Amendment Regulations, 1984.

In exercise of the powers conferred by the Act on the Central Government, it has made the MRTP Rules, 1970 as amended by the Amendment Rules, 1984 and the M.R.T.P. (Information) Rules, 1971 as amended by the Amendment Rules, 1984 These not only facilitate understanding of the procedural requirements but also serve as guide to achieving the object of prevention of concentration of economic power to the common detriment.

Applicability of the Act: In terms of Section 3, this Act is inapplicable to the following entities, unless the Central Government, by notification, otherwise directs. These entities are : (a) any undertaking owned or controlled by a Government Company ; (b) any undertaking owned or controlled by the Government ; (c) any undertaking owned or controlled by a corporation (not being a company i.e., a company under the Companies Act) established by or under any Central, Provincial or State Act ; (d) any trade union or other association of workmen or employees formed for

their own reasonable protection as such workmen or employees; (e) any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force; (f) any undertaking owned by a co-operative society formed and registered under any Central, Provincial or State Act relating to co-operative societies; (g) any financial institution. According to Explanation to the Section, in determining, for the purposes of clause (c) above, whether or not any undertaking is owned or controlled by a corporation, the shares held by financial institutions shall not be taken into account.

It may be noted that the application of other laws to the above categories of undertakes is not barred. Accordingly, under Section 4(1), save as otherwise provides in sub-section (2) [discussed hereunder] or elsewhere in the Act, the provisions of this Act shall be in addition to, not in derogation of, any other law for the time being in force. Sub-section (2) exempts banking companies, the State Bank of India and its subsidiaries and insurance companies from the provisions of the Act. May it be noted that this exemption is in addition to the exemptions conferred by Section 3. But the exemption is not total and is available only on showing, in respect of specific provisions in the Act, that corresponding provisions already exist in relation to those categories of companies in the Special Statutes governing them. However, where there are no corresponding provisions in the Reserve Bank of India Act, State Bank of India (Subsidiary Banks) Act or the Insurance Act, the provisions of the MRTP Act would still continue to apply.

Definitions (Section 2):

(a) "*Agreement*" includes any arrangement or understanding whether or not it is intended that such agreement shall be enforceable (apart from any provisions of this Act) by legal proceedings.

The element of mutuality is inherent in the word "agreement". The use of the word like "arrangement" or "understanding" does not take away the attribute of mutuality. Thus a mere direction or recommendation by one party in circumstances which do not warrant the acceptance of any obligation (whether legal or moral) by the other party cannot constitute an arrangement; this is because in that event, the element of enforceability will not be present. This is, however, subject to an exception or special provision made elsewhere in the Act. The expression "apart from any provisions of this Act" refers to such an exception. One such exception is contained in Explanation III to Section 35 which provides that any recommendation by a trade association shall be deemed to be a recommendation which binds the members of such association. Explanation II to Section 35 also makes an exception to the principle of mutuality in the sense that an agreement of the association with any other party is deemed to be an agreement as though the members of such association were also a party. In appropriate cases, therefore, Explanation II will permit a departure from the well-known canon of corporate jurisprudence that the corporation has a personality separate and distinct from its members [*In re, All India X-Ray & Electro-medical Traders' Association, 1976* Tax LR 1316 (MRTPC)].

(b) *Commission* : It means the MRTP Commission established under Section 5.

(c) *Director General* : This means the Director General of Investigation and Registration appointed under Section 8, and includes any Additional, Joint, Deputy or Assistant Director General of Investigation and Registration appointed under that Section.

(d) *Dominant Undertaking* : This expression means :

1. Any undertaking which has the following three features namely—(i) it is an undertaking within the purview of the Industries Act ; (ii) it has a licensed capacity for the production of goods of any description ; and (iii) its licensed capacity for the production of such goods or the aggregate of its licensed capacity and of the licensed capacity of inter-connected undetakings, for the production of such good is not less than 1/4th of the total installed capacity in India for the production of such goods ; or

2. An undertaking which has all the following three features, namely—(i) it is an undertaking within the purview of the Industries Act [i.e. Industries (Development & Regulation) Act, 1951—vide Section 2(ff)] ; (ii) it, by itself or along with inter-connected undertakings, produces, supplies, distributes or otherwise controls not less than 1/4th of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof ; and (iii) it has no licensed capacity for the production of such goods ; or

3. An undertaking which has both the following features, namely—(i) it is an undertaking within the purview of the Industries (D & R) Act ; and (ii) it, by itself or along with inter-connected undertakings, produces, supplies, distributes or otherwise controls not less than 1/4th of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof ; or

4. An undertaking which provides or otherwise controls not less than 1/4th of any services that are rendered in India or any substantial part thereof.

Thus, the dominance of an undertaking is determinable with reference to the licensed capacity or market share of the undertaking depending upon whether or not the undertaking falls within the ambit of the I (D & R) Act.

Licensed capacity of the undertaking in this context needs elaboration. It is the criterion for the determination of dominance in respect of an undertaking falling within the compass of the Industries (D & R) Act. Dominance of such an undertaking will be regarded as if its licensed capacity for the production of such goods or the aggregate of its licensed capacity for the production of such goods and the licensed capacity of its inter connected undertakings for the production of such goods is not less than 1/4th of the total *installed capacity* [i.e. installed capacity as recognised under the Industries Act or any returns thereunder vide Section 2(ff)] in India for the production of such goods. According to Section 2(gg), "licensed

capacity", in relation to goods of any description and with respect to an undertaking within the purview of the Industries Act, means the licensed or productive capacity of such undertaking in relation to such goods, in accordance with the certificate of registration, license, letter of intent or permission granted to it under the Industries Act and includes any increase in such capacity as may be approved by the Government under that Act.

Market Share of the undertaking, it may be noted, is the factor on which the dominance of an undertaking is dependent (vide 2 & 4 above), where the undertakings fall within the ambit of the I (D & R) Act but do not have a licensed capacity or where the undertakings do not fall within the purview of the I (D & R) Act.

In order to determine 'dominance' of an undertaking, "goods of one description" (variously interpreted) should be aggregated. The MRTP (Classification of Goods) Rules, 1971 as amended up to date, shall apply for the purposes of Chapter III regarding concentration of economic power. Rule 2(2) thereof provides that; (i) Goods which fall within a group specified in the Schedule to these Rules (of 1971) and not falling within any sub-group or item shall be classified as goods of one description; (ii) where any goods falling within a group, also falls within a sub-group, goods falling within that sub-group shall be classified as goods of one description; (iii) where goods falling within any sub-group, also falls within any item specified under that sub-group, goods falling within that item shall be classified as goods of one description.

According to Section 2(ee), "goods of any description in relation to an undertaking within the purview of that I (D & R) Act, means any articles which falls under an item in the First Schedule to that Act.

For purposes of Chapter IV of the MRTP Act which relates to monopolistic trade practices, "goods of one description" means goods that are commercially identifiable and are substituteable. This is because MRTP (Classification of Goods) Rules, 1971 can be invoked only for the purposes of Chapter III of the Act.

According to the proviso to Section 2(d), for the determination of dominance of an undertaking, the goods produced by an undertaking which does not employ (a) more than 50 workers on any day of the relevant period and in any part of which a manufacturing process is being carried on *with the aid of power* or is ordinarily so carried on, or (b) more than 100 workers on any day of the relevant period and in any part of which a manufacturing process is being carried on *without the aid of power* or is ordinarily so carried on shall not be taken into account.

According to Explanation I, where the licensed capacity of inter connected undertakings for the production of any goods is not less than ¼th of the installed capacity for the production such goods or not less than 1/4th of the production, supply, distribution or control of any goods or the provision or control of any service, as the case may be, is shared by inter-connected undertakings, each such undertaking shall be deemed to be "dominant undertaking". This provision may be exemplified by means of an illustration thus: Suppose Au, Bu, Cu and Du are inter-connected undertakings and the first three undertakings produce a particular

description of goods the production whereof is more than 1/4th of the total production of the country. In such a situation Au, Bu and Cu will be individually regarded as "dominant" undertakings, although it may be found that the first alone accounts for only 10%, second for only 7% and the third only 8%.

According to Explanation VI, in order to determine the "dominance" of an undertaking, the figures of production spread over the period of 3 calendar years immediately preceding the calendar year in which the question arises as to whether or not an undertaking is a dominant undertaking, are to be considered; and the share of the undertaking is determined with reference to the lowest figure of production during any one of the said years. The impact of this provision may be illustrated thus: Suppose, the question as to whether or not an undertaking is a dominant one is to be determined in 1984. As per the aforesaid provision, the relevant period for consideration of the figures of production would be any one of the 3 calendar years, 1980, 1981 and 1982. Consequently, even if the figures of the undertaking are 1/4th in the calendar year, 1983, the undertaking shall be a "dominant undertaking in 1984, if during any one calendar year, *viz.*, 1980, 1981 and 1982 its production figures are less than 1/4th of the all-India figures.

Explanation IV provides that in determining, with reference to the features specified 2, 3 or 4 above. (as the case may be) the question as to whether or not an undertaking is a dominant one, regard shall be had to: (i) the average annual production of the goods, or the average annual value of the services provided by the undertaking during the relevant period; and (ii) the figures published by such authority as the Central Government may, by notification, specify, with regard to the total production of such goods made, or the total value of such services provided, in India or any substantial part thereof during the relevant period.

Explanation V provides that, in determining the question of "dominance" on the part of an undertaking in relation to any goods supplied, distributed or controlled in India, regard shall be had to the average annual quantity of such goods supplied, distributed or controlled in India by the undertaking during the relevant period.

According to Explanation III, the share of the undertaking (i.e. 1/4th of production or service) has to be determined according to any of the following criteria, namely—value, cost, price, quantity of the goods or services.

Explanation II provides that where any goods of any description are the subject of different forms of production, supply, distribution or control, every reference in this Act to such goods shall be construed as reference to any of those forms of production, supply, distribution or control, whether taken separately or together or in such groups as may be prescribed.

Explanation VII provides that where goods of any description in India by an undertaking have been exported abroad, then the goods so exported shall not be taken into account in computing—(i) the total gooods of that description that are produced in India by that undertaking; or (ii) the total goods of that descrip-

tion that are produced, supplied or distributed in India or any substantial part thereof.

[Tutorial Notes: 1. Dominance shall be presumed where an undertaking has produced 1/4th of the country's total production, supply, distribution or control of any goods or services.

2. Different tests for measuring dominance have been prescribed for an undertaking falling within the domain of I (D & R) Act and for that not so falling. In respect of the former, "dominance" shall be measured by comparing the licensed capacity of the undertaking with the total installed capacity in the country of any item coming under the First Schedule to that Act. The tendency to pre-empt capacity has been sought to be made abortive by prescribing the test of 1/4th licensed capacity of the undertaking *vis-a-vis* the total installed capacity in the country.]

(*e*) *Financial institution*: This expression means: (i) a public financial institution specified in or under Section 4A of the Companies Act; (ii) a State Financial, Industrial or Investment Corporation; (iii) the State Bank of India or a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959; (iv) a nationalised bank, that is to say, corresponding new bank as defined in Section 2(d) of the Banking Companies (Acquisition and Transfer of Undertakings) Act of 1970 or 1980; (v) the General Insurance Corporation of India established under Section 9 of the General Insurance Business (Nationalisation) Act, 1972; (vi) the Industrial Reconstruction Corporation of India; (vii) any other institution which the Central Government may, by notification, specify in this behalf.

(f) *Goods*: Under Section 2(e), goods means as defined in the Sale of Goods Act, and includes—(i) products manufactured, processed or mined in India [i.e., the territories to which the Act extends—vide Section 2(f)]; (ii) shares and stocks; (iii) in relation to goods supplied, distributed or controlled in India, goods imported into India.

It may be noted that the definition of goods has been widened by the 1984 Amendment Act so as to net the cases of investment companies dealing in stocks and shares and other activities like mining or processing, *e.g.*, fish and animal products, which were not covered by the earlier definition.

(g) *Group*: Prior to 1984 Amendment Act, the concept of "group" consisted of two elements, namely, controlling entities and controlled entities. The controlling entities were individuals or associations or firms or bodies corporate or any combination thereof. The controlled entities were body corporate, firm or trusts. Trusts were not included amongst controlling entities. As a result of this definition of group [vide Section 2(18A) of the Companies Act], difficulties were experienced in establishing if a group has the object of exercising control over any body corporate, firm or trust, etc. Since this posed practical difficulties, the Sachar committee felt it would be possible to prove with reference to past conduct of the group that it exercises or is in a position to exercise control over the controlled entities. The

definition of "group" as contained in Section 2(e) has been the outcome of the suggestion of the Sachar Committee.

According to the definition under the MRTP Act, "group" means a group of : (i) two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions) or any combination thereof, which exercises or is established to be in a position to exercise control directly or indirectly over any body corporate, firm or trust, or (ii) associated persons.

A group of persons who are able directly or indirectly to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it.

In relation to a director of a body corporate. "associated persons" mean : (a) a relative of such director, and includes a firm in which such director or his relative is a partner. For example, A, a practising chartered accountant, and B, an engineer, are two brothers. B is the director of X & Co. Ltd. By dint of this provision, A and his professional firm will become "associated person" in relation to B who is the director of X & Co. Ltd ; (b) any trust of which any such director or his relative is a trustee ; (c) any company of which such director, whether independently or together with his relatives, constitutes 1/4th of A's Board of Directors ; (d) any other body corporate, at any general meeting of which not less than 1/4th of the total number of directors of such other body corporate are appointed or controlled by the director of the first-mentioned body corporate or his relative, whether acting singly or jointly.

In relation to the partner of a firm, "associated persons" mean a relative of such partner and includes any other partner of such firm. For example, A and B are two brothers-in-law. A is a practising chartered accountant. If B is a partner of a firm covered by the provisions of the Act, then A will become an associated person in relation to B. This will also hold good in the case of solicitor firms, architects and the like.

In relation to the trustee of a trust, "associated persons" mean any other trustee of such trust.

Where any person is an associated in relation to another, the latter shall also be an associated person in relation to the former For instance, if A is an associated person in relation to B, then B shall also be an associated person in relation to A.

(*h*) *Inter-Connected Undertakings* : According to Section 2(g), this term means two or more undertakings which are inter-connected with each other in any of the manner dwelt upon below :

(*i*) If one owns or controls the other. Suppose, there are two undertakings, Au and Bu. If Au owns or controls Bu, then Au and Bu would be inter-connected undertakings ;

(*ii*) Where the undertakings are owned by firms, if such firms have one or more common partners. For example, X & Co. with X, Y, Z as its partners owns Au, and A & Co. with A, B, Z as it partners owns Bu. In such a situation, Au and Bu are inter-connected undertakings because a partner viz. Z, is a common partner in both the firms ;

(iii) Where the undertakings are owned by bodies corporate (a) if one body corporate manages the other body corporate : or (b) if one body corporate is a subsidiary of the other body corporate ; or (c) if the bodies corporate are under the same management ; or (d) if one body corporate exercises control over the other body corporate in any other manner. This concept may be illustrated thus : Au is owned by A & Co. Ltd. and Bu is owned by X & Co. Ltd. Au and Bu would be inter-connected if : (a) A & Co. Ltd. manages X & Co. Ltd. and *vice versa* or (b) A & Co. Ltd. is a subsdiary of X & Co. Ltd. and *vice versa* ; or (c) A & Co. Ltd. and X & Co. Ltd. are under the same management ; or (d) A & Co. Ltd. exercises control over X & Co. Ltd. in any other manner :

(iv) Where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm (a) hold directly or indirectly not less than 50% of the shares, whether preference or equity, of the body corporate ; or (b) exercise directly or indirectly control, whether as director or otherwise, over the body corporate. For instance Au is owned by X & Co. Ltd., and Bu by A & Co. having A, B and C as its partners. A and B hold directly or indirectly 50% shares in X & Co. Ltd. In such a circumstance, Au and Bu would be treated as inter-connected. Likewise, should one or more of the partners of A & Co. exercise control directly or indirectly, whether as director or otherwise, over X & Co. Ltd., then Au and Bu would be regarded as inter-connected ;

(v) If one undertaking is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management. For example, Au is owned by X & Co. Ltd. and Bu by D & Co. which is a firm. A & Co. Ltd. and M & Co. Ltd. are two partners in D & Co. These two partners – bodies corporate and X & Co Ltd. are under the same management. In such a situation Au and Bu would be inter-connected undertakings ;

(vi) If the undertakings are owned or controlled by the same person or by the same group, Au and Bu are inter-connected undertakings, if they are owned or controlled by the same person or by the same "group" [as defined in Section 2(ef)] :

(vii) If one undertaking is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses. For example, Bu is inter-connected with Au and Cu is inter-connected with Bu. Cu is inter-connected with Au. If Du is inter-connected with Cu, then Du will be inter-connected with Cu and consequently with Au—so on and so forth.

According to Explanation I, two bodies corporate shall be deemed to be under the same management in the cases mentioned below :

(i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group ; or

(ii) if the managing director or manager of one of such body corporate is the managing director or manager of the other ; or

(iii) if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of Directors of the other ; or

(iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with the relative of such directors) one-fourth of the directors of the other ; or

(v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in the other ; or

(vi) if the same body corporate or bodies corporate belonging to a group, holding, (whether independently or along with its or their subsidiary or subsidiaries) not less than one-fourth of the equity shares) in one body corporate also hold not less than one-fourth of the equity shares in the other ; or

(vii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries) ; or

(viii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group, or jointly by such individual or individuals and one or more of such other bodies corporate ; or

(ix) if the directors of the one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

As per Explanation II, if a group (as defined by this Act) exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of or controlled by the group shall be deemed to be under the same management. For instance, if A & Co. Ltd. is constituent of a group which exercises control over B & Co. Ltd., then A & Co. and B & Co. Ltd. would be under the same management.

By virtue of Explanation III, if two or more bodies corporate under the same management hold, in the aggregate not less than 1/4th equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first-mentioned bodies corporate. A & Co. Ltd. and B & Co. Ltd. which are under the same management hold together 1/4th equity share capital in C & Co. Ltd. In such a case, all the three bodies corporate are under the same management.

By virtue of Explanation IV, in determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions (as defined by Section 2 of this Act) in such bodies corporate shall not be taken into account.

(*f*) *Member* : Under Section 2(h), the term means a member of the Commission.

(j) *Monopolistic Trade Practice* : Section (2)(i) provides that the term means a trade practice which has, or is likely to have, the effect of : (a) maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description or the supply of any services or in any other manner ; (b) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any service ; (c) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate ; (d) increasing unreasonaly the cost of production of any goods, or charges for the provision, or maintenance, of any services ; (e) increasing unreasonably —(i) the

prices at which the goods are, or may be, sold or re-sold, or the charges at which the services are or may be, provided ; or (ii) the profit which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any services ; (f) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

(*k*) *Owner* : Section 2 (ja) provides that owner, in relation to an undertaking, means an individual, H.U.F., body corporate or other association of individuals, whether incorporated or not, or trust (whether public or private, whether religious or charitable) who or which owns or controls the whole or substantially the whole of such undertakings, and includes any associated person who is a constituent of a group and who has the ultimate control over the affairs of such undertaking.

(*l*) *Price* : Section 2 (l) provides that price, in relation to the sale of any goods or to the performance of any service, includes every valuable consideration whether direct or indirect and includes any consideration which in effect relates to the sale of any goods or to the performance of any services, although ostensibly relating to any other matter or thing.

(*m*) *Produce* : Under Section 2(ll), produce includes manufacture and all its grammatical variations and cognate expressions shall be construed accordingly.

(*n*) *Restrictive Trade Practice* : According to Section 2 (0), the expression means a trade practice which has, or may have, the effect of preventing, distoring or restricting competition in any manner and in particular, (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on consumers unjustified costs or restrictions.

(*o*) *Scheme of Finance* : This, under Section 2(q), means a scheme indicating the sources from which, and the terms and conditions on which, finances are proposed to be obtained by an undertaking. It has been provided that after the commencement of the MRTP (Amendment) Act of 1984 i.e. after 21.5.1984), in every Scheme of finance, the estimated capital outlay which would be needed to give effect to the scheme will have to be included.

(*p*) *Service* : By virtue of Section 2(r), service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information, *but does not include* the rendering of any service free of charge or under a contract of personal service.

(*q*) *Trade* : Under Section 2(s), "trade" means any trade, business, industry, profession or occupation relating to the production, supply, distribution or control of goods and includes the provision of any services.

(*r*) *Trade Association* : According to Section 2(t), the term means any body of persons (whether or not incorporated) which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members.

(*s*) *Trade Practice* : As per Section 2(u), it means any practice relating to the carrying on of any trade, and *includes* : (a) anything done by any person, which controls or affects the price charged by, or the method of trading of, any trader or class of traders, (b) a single or isolated action of any person in relation to any trade.

(*t*) *Undertaking* : According to Section 2(v), undertaking means an enterprise which is, or has been, or is proposed to be engaged in the production, storage, supply, distribution, acquisition or control of *articles* or goods, or the provision of *services*, of any kind, either directly or through one or more of its units or divisions, whether such *unit or division* is located at the same place where the undertaking is located or at a different place (s). According to Explanation I, "article" includes new article and "service" includes a new service ; "unit" or "division" in relation to an undertaking includes : (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods ; (ii) any branch or office established for the provision of any service.

Under Explanation II, a body corporate which is, or has been, engaged only in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate shall be deemed to be an undertaking. Under Explanation III, an "investment company" shall be deemed to be an undertaking.

(*u*) *Value of assets* : This term, in terms of Section 2 (w), means, in relation to an undertaking, the value of its assets as shown in its books of account after making provision for depreciation.

Powers of the Central Government to decide certain matters : Consequent upon the introduction of the definition of "group" etc. in the Act, it is ncessary to provide for its determination by the Central Government and also to take power to require the Company Law Board, which is already specialised in such determination, to determine "group" etc under the Act". Accordingly, Section 2A makes the requisite provisions. It may so happen that any question may arise as to whether : (*a*) two or more individuals, trustees, associations of individuals, firms or bodies corporate or any combination thereof constitute or fall within a "Group" or (b) two or more undertakings are "inter-connected undertaking" within the meaning of this Act ; or (c) two or more bodies corporate are "under the same management. Such question is to be resolved either by the Central Government or by the Company Law Board authorised by the Central Government to do so. But prior to the decision of such question, the concerned persons must be given reasonable opportunity of being heard.

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CORPORATE LAW

STUDY—XII

ADMINISTRATIVE ASPECTS OF THE MRTP ACT

This Study covers :

M. R. T. P Commission

- Constitution of the Commission
- Terms of office, conditions of service etc. of members
- Remuneration, allowance, etc. of members
- Travelling and daily allowance
- Removal of members from office
- Appointment of Director General and the staff of the Commission
- Salaries, etc. to be defrayed out of the Consolidated Fund of India

Jurisdiction, Powers and Procedures of the Commission :

- Enquiry into monopolistic or restrictive trade practices
- Investigation by Director General before issue of process of the Commission
- Commission's power to grant temporary injunction
- Commission's power to award compensation
- Enforcement of the order made by Commission under Section 12A or 12B
- Orders of Commission may be subject to conditions etc.

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Power of the Commission to cause investigation to find out whether or not orders made by it have been complied with

Orders where party concerned does not carry on business in India

Restriction of application of orders in certain cases

Sittings of the Commission

Hearing to be in public except in certain circumstances

Procedure of the Commission

Order of the Commission to be noted in the register

Central Government and the administration of the Act

The Court and the administration of the Act

Prescribed Readings : MRTP—A Compendium by A.M. Chakraborti, 1984 Edition (Takman Publication).

M.R.T.P. Commission

Any enactment is intended to achieve certain objectives. It imposes upon persons cetrain powers, duties and obligations. The statute itself appoints different authorities for the purpose of governance of the statute. These divergent authorities are vested with sufficient powers for the purpose. These powers vary in nature, depending upon the scheme of the enactment as also the nature of compliance prescribed by it.

The scheme of the M.R.T.P. Act, 1969, as amended by the Amendment Act of 1984 (effective from 21st July, 1984), provides for a dual machinery for implementation of its provision. These two are the Central Government and the MRTP Commission (hereinafter referred to as the Commission). This Commission is to be assisted in its work by the Director General of Investigation and Registration appointed under Section 8 of the Act, including any Additional, Joint, Deputy or Assistant Director General of Investigation and Registration appointed under that Section.

Although the aforementioned authorities have been bestowed with enough powers to oversee the compliance with the various requirements of the Act, nonetheless the nature and content of their powers differ. It will be seen hereinafter that the Commission has, under Section 12, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of certain matters; while the Central Government does not have such powers. The functions of the Central Government under the Act are in the sphere of ensuring that the operation of the economic system does not result in the concentration of economic power to the common detriment and for the control of monopolies. The powers in this behalf, in so far as contained in Chapter III, are exercisable by the Government and if it so chooses, in consultation with the Commission. Thus, in respect of such matters, the Commission has merely advisory role, while the Government has the absolute power to pass final orders. Again the Central, or the Company Law Board under the Central Govrenment's authority will be required to decide disputed questions relating to "group", "same management" and "interconnection".

The nature and scope of the powers of the authorities, mentioned above are being discussed hereunder.

Constitution of the Commission : Under Section 5, the Commission shall consist of a Chairman and not less than 2 and not more than 8 other members, to be appointed by the Central Government.

To be a Chairman of the Commission, the person must be one who is, or has been, or is qualified to be : (*i*) a judge of the Supreme Court ; or (*ii*) a judge of a High Court. To be the members of the Commission, the persons must be of ability, integrity and standing ; these persons must have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

Further, prior to the appointment of any person as a member, the Central Government has to satisfy itself that the person does not, and will not, have any such financial or other interest as is likely to affect prejudicially his functions as such member.

The Commission is required to inquire and report to the Central Government in regard to such cases of substantial expansion of undertakings (Section 21), setting up of new undertakings (Section 22), merger, amalgamation or take-over (Section 23) and division of undertakings (Sections 27 and 27A) as may be referred to it by the Central Government for enquiry. Similarly, in regard to cases of monopolistic trade practices, the Commission has an advisory capacity. However, it is vested with full regulatory powers in regard to restrictive trade practices.

Terms of Office conditions of service etc. of members :

Section 6 provides that every member shall hold office for such period, not exceeding 5 years, as the Central Government may specify by notification made under Section 5. But such person shall be eligible for re-appointment after the tenure of his office. However, such person cannot be re-appointed if he has acted as member for a total period of ten years, or after he has attained the age of 65 years, whichever is earlier.

A member may resign his office at any time by writing under his hand and addressed to the Central Government. He may also be removed from his office by the Central Government in the circumstances mentioned in Section 7.

A casual vacancy caused by the resignation or removal of the Chairman or any other member of the Commission (under the provision contained in the immediately preceding paragraph) or otherwise shall be filled by fresh appointment. Thus, the Chairman also can resign or be removed like any other member.

In case of casual vacancy occurring in the office of the Chairman, the senior-most of the existing member will discharge the function until a person appointed to fill the vacancy assumes the office of the Chairman. If however, the Chairman is unable to discharge his function owing to absence, illness or any other cause, he may authorise the senior-most member to discharge the function in his stead. If the senior-most member is so authorised, he would act as the Chairman till he resumes the charge of his functions.

Any act or proceeding of the Commission shall not be invalid by reason only of the existence of any vacancy among its members or any defect in the constitution thereof.

The Chairman and other members shall get such remuneration and other allowance, and shall be governed by such conditions of service as have been prescribed by the MRTP Commission (Conditions of Service of Chairman and Members) Rules, 1970 (vide G.S.R. 1122 dated 1.8.70). However, their remuneration cannot be varied to their disadvantage after their appointment.

If there is a difference of opinion among the members of the Commission, the opinion of the majority shall prevail ; and the opinion or the orders of the Commission shall be expressed in terms of the views of the majority.

The Chairman and every other member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in the form and manner and before such authority as may be prescribed. Under Rule 7 of the MRTP Commission (Conditions of Service of Chairman and Members) Rules, 1970, the Chairman is to do so before the Chief Justice of India or, in his absence, the senior-most judge of the Supreme Court in form I and II respectively referred to in the Schedule to these and a member is to do so before the Chairman in the aforesaid form.

There is an embargo on the Chairman or any member, on cessation of his office, he is debarred from holding any appointment in, or be connected with the management or administration of, any industry or undertaking to which this Act applies for a period of 5 years from the date of his cessation.

Remuneration, allowance, etc. of Chairman : By virtue of Rule 3 of the MRTP Commission (Conditions of Service of Chairman and Members) Rule, 1970, a Chairman or a member, should he be a retired judge of the Supreme Court or of any High Court and shall be paid such salary which together with his pension and pension equivalent to any other form of retirement benefits must not exceed the last pay drawn by him before retirement. He shall be entitled to such allowances and other benefits as are admissible to a serving judge of the Supreme Court or of a High Court.

If the Chairman or member retires from services as a judge of the Supreme Court or of a High Court during the term of office of such Chairman or member, then he shall be paid for the period he serves as Chairman or member after retirement, such salary which, together with his pension and pension-equivalent of any other form of retirement benefits shall not exceed the last pay drawn by him before retirement.

If a person other than a serving or retired judge of the Supreme Court or of a High Court is appointed as Chairman, he shall get a salary of Rs. 3,500 per month. He can also draw, in addition to Rs. 3,500, such allowances as are admissible to a Government officer of the first grade.

But if a person at the time of his appointment as Chairman is in receipt of a pension in respect of any previous service under the Government or any local body or authority owned or controlled by the Government, such salary shall be reduced by the amount of pension and pension equivalent of any other form of retirement benefits.

Remuneration, allowance of Members : Under Rule 4 of the aforesaid Rules of 1970, a person, not being a serving or a retired judge of the Supreme Court or of a High Court, appointed as member shall be paid a salary of Rs. 3,000 per month plus the usual allowances admissible to a Government officer of the first grade.

Travelling and daily allowances : In terms of Rule 5, if the Chairman or a member is serving or a retired judge as aforesaid, he shall draw such allowances as are admissible under the Supreme Court Judges (Travelling Allowances) Rules, 1959, or, as the case may be, the High Court Judges (Travelling Allowances) Rules, 1956. If, however, he is not a serving or a retired judge, he will get at the same rates as are admissible to a Government officer of the first grade.

Removal of members from office : Section 7 empowers the Central Government to remove a member of the Commission from office in *any one* of the following circumstances, namely :—

(a) If he has been adjudged an insolvent;

(b) If he has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude;

(c) If he has become physically or mentally incapable of acting as such member;

(d) If he has acquired such financial or other interest as is likely to affect prejudicially his functions as a member;

(e) If he has so abused his position as to render his continuance in office prejudicially to the public interest.

However, a member cannot be removed from his office on the ground specified in (d) or (e) above, as a matter of course. For the removal on either of these grounds, the Central Government has to make a reference to the Supreme Court. Thereupon, if the Supreme Court, on an enquiry conducted by it in accordance with Supreme Court Rules, 1966 (vide G.S.R. 73 dated 7.1.1971) has reported that the member ought, on such grounds, to be removed, then only the removal on either of the said grounds is permissible by the Central Government. This safeguard is intended to serve the independence of the Commission.

Appointment of Director General and the staff of the Commission : It may be recapitulated that under Section 2(c) Director General means the Director General of Investigation and Registration appointed under Section 8, and includes any Additional, Joint, Deputy or Assistant Director General of Investigation and Registration appointed under that Section. By amending Section 8 and repealing Section 34 relating to the Registrar of Restrictive Trade Agreement (RRTA), the functions of the former Director of Investigation and the RRTA have been combined and the office has been redesignated. Under Section 8, as amended by the Amendment Act of 1984, the Central Government may by notification appoint a Director General of Investigation and Registration. It may appoint as many Additional, Joint, Deputy or Assistant Director General as it may think fit. Such appointments are made for making investigation for the purposes of this Act and for maintaining a Register of Agreements which are subject to registration under this Act; also for performing such other functions as are, or may be provided by or under this Act.

The Director General may, by written order, authorise one of the Additional Joint, Deputy or Assistant Directors General to function as the Registrar of Agreements which are subject to registration under this Act.

Every person authorised to function as the Registrar of Agreements and every Additional, Joint, Deputy or Assistant Director General shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

The Central Government may provide the staff of the Commission and may, in addition, make provisions for conditions of service of the Director General, Additional, Joint, Deputy or Assistant Director General and of the members of the staff of the Commission. Their conditions of service are not to be varied to their disadvantages.

Salaries etc., to be defrayed out of the Consolidated Fund of India : Section 9 provides that salaries and allowances payable to the members and the administrative expenses including salaries, allowance and pensions payable to or in respect of officers and employees of the Commission shall be defrayed out of the Consolidated Fund of India.

Despite the Commission being a statutorily constituted independent body it does not have any source of revenue to maintain its affairs. Therefore, all expenses

are to be borne out of the General Revenues, the Consolidated Fund of India in terms of Article 266 of the Constitution of India.

As is evident from the amended Section 2(c) read with Section 8 (discussed above), the main function of the Director General of Investigation and Registration is to carry investigation under the MRTP Commission Regulations framed by the Commission in exercise of the powers conferred on it by Sections 18 and 66 of the Act. Chapter II of the said Regulations prescribe the duties and functions of the Director General of Investigation and Registration. In this context, it may be noted that Section 11 (as substituted by the 1984 Amendment Act) confers the necessary powers on the Director General to make investigation for the purpose of enquiry by the Commission. According to this Section which is mandatory in nature, if a complaint is made by an association having membership of not less than 25 persons (i.e. 25 or more) or by 25 or more consumers [vide Section 10 (a) (I)], then such complaint is to be referred to the Director General for preliminary investigation. The Director General would submit his investigation report to the Commission which may take such action as is deemed fit after consideration of the said report.

By virtue of Regulation 35 of the MRTP Commission Regulations, 1974, the Commission may at any time direct the Director General or any one or more of its officers to study and investigate, and report or furnish information on any trade practice as may constitute or contribute to monopolistic or restrictive trade practices or unfair trade practices existing in any trade or are alleged to have been practised by any producer, distributor or dealer or a group of producers, distributors, dealers, or in respect of any application or reference under Chapters III, IV, V and VI or Section 61 of the Act. The Commission can also ask the Director General or any officer(s) of the Commission for a further or supplementary report or information if the earlier report or information submitted by him to the Commission appears to be insufficient or inadequate. Under Regulation 20, the Commission shall direct the Director General of Investigation and Registration to complete the preliminary investigation and submit a report (5 copies) within such time as it may fix. However, this time limit is extendable by the Commission on a request for extension being made to it by the Director General.

Under Regulation 21, the Commission may, in its discretion, at any stage of the inquiry bring on record, for the purpose of the inquiry, the report of the Director General and any information or other material collected by the Director General or any part of such report, information or material, provided that the Commission shall not bring on record such part or parts of the report, information or material the disclosure of which, in the opinion of the Commission, is not relevant to the inquiry, or in public interest. The Director General shall be entitled to reply where his report or the evidence or material collected by him or, any part thereof, brought on the record is sought to be rebutted by any party.

Under Regulation 22, where the Commission, on a perusal of the Director General's report submitted under Regulation 20, is of the view that a further investigation is necessary, it may direct the Direct General to make such further investigation as the Commission may think necessary and submit a further report. Where on a perusal of the report of the Director General submitted under Regulation 20 or further report under sub-regulation (1) of this regulation or both, as the case may be, the Commission is of the opinion that no prima facie case is made out for

the issuance of notice of inquiry in respect of all or any of the allegations, it may drop the proceedings in respect of all or any of the allegations, as the case may be; Provided that where investigation has been made on the basis of a complaint, reference or application under Section 10 of the Act, the Commission shall give the complainant, the concerned Government or the Director General, as the case may be, an opportunity of being heard before ordering the dropping of the proceedings in respect of all or any of the allegations.

In terms of Regulation 23, if the Commission, after considering the report of the Director General referred to in Regulations 20 and 22, forms the opinion that an enquiry should be held, then it can institute an enquiry in accordance with the procedure laid down in Chapter IX or IXA of the M.R.T.P. Commission Regulations, By virtue of Regulation 24, the Commission can institute an enquiry, if it so thinks necessary, into a monopolistic trade practice, under Section 10(b) of the Act, upon a reference made to it by the Central Government or upon its own knowledge or information.

JURISDICTION, POWERS & PROCEDURE OF THE COMMISSION

Enquiry into Monopolistic or Restrictive Trade Practices : Under Section 10, the Commission may enquire into : (a) any restrictive trade practice; and (b) any monopolistic trade practice, upon a reference made to it or upon its own knowledge or information.

The jurisdiction of the Commission in respect of (a) above can be exercised in any one of the following four circumstances, namely—(i) upon receiving a complaint of facts which constitute such practice from any trade or consumers' association having a membership, as stated earlier, of 25 persons or more or from 25 or more consumers; (ii) upon a reference made to it by Central Government or a State Government; (iii) upon an application made to it by the Director General of Investigation and Registration; (iv) upon its own knowledge or information.

The jurisdiction of the Commission with regard to another matter, viz., concentration of economic power, can be exercised only on a reference made to it by the Central Government. In so far as the matter comprised in Chapters III and IV are concerned the Commission's role is advisory; that is to say, in respect of such matters the Commission's duty is to send to the Central Government reports and recommendations for taking such action as the Central Government deems fit and proper. But in so far as the matters pertaining to restrictive trade practices are concerned, the Commission enjoys the absolute powers to pass final orders thereon.

Investigation by Director General before issue of process in certain circumstances : Under Section 11, in respect to any restrictive trade practice of which complaint is made under Section 10(a) (i), discussed earlier, the Commission shall, before issuing any process requiring the attendance of the person complained against, cause a preliminary investigation to be made by the Director General of Investigation and Registration in such manner as it may direct. Thereupon, the Director General has to submit a report to the Commission to enable it to satisfy itself as to whether or not the complaint requires to be inquired into.

The Director General may, upon his own knowledge or information or on a complaint made to him make or cause to be made a preliminary investigation in

such manner as he may think fit. This preliminary investigation is intended to enable him to satisfy himself as to whether or not an application under Section 10(a) (iii) (discussed earlier) should be made by him to the Commission.

For the purpose of either of the aforesaid preliminary investigations, the Director General in the first-mentioned case and the Director General or any other person in the second-mentioned case shall have the same powers as an Inspector has under Sections 240 and 240A of the Companies Act [vide Section 44 (2) of the M.R.T.P. Act].

An order or requisition made by a person making an investigation as aforesaid shall be enforced in the same manner as if it were an order or requisition made by an Inspector under Section 240 or Section 240A of the Companies Act. Any contravention of such order or requisition shall be punishable in the same manner as though it were an order or requisition made by an Inspector appointed under the said Section 240 or Section 240A.

Powers of the Commission : Section 12 lays down the powers. For the purposes of *any enquiry* under this Act, the Commission has the same powers as are vested in a Civil Court under the Civil Procedure Code, 1908, while trying a suit in respect of the following matters, namely—(a) the summoning and enforcing the attendance of any witness and examining him on oath; (b) the discovery and production of any document or other material object producible as evidence; (c) the reception of evidence on affidavits; (d) the requisitioning of any public record from any Court or office; (e) the issuing of any Commission for the examination of witnesses [sub-section (1)].

Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code; and the Commission shall be deemed to be a civil Court for the purpose of Section 195 and Chapter XXXV of the Criminal Procedure Code [sub-section (2)].

The Commission has the power to require any person : (a) to produce before, and allow to be examined and kept by, an officer of the Commission in this behalf, such books, accounts or other documents in the custody and under the control of the persons so required as may be specified or described in the requisition, being documents relating to any trade practice, the examination of which may be required for the purposes of this Act; and (b) to furnish to an officer so specified such information as respects the trade practice as may be required for the purposes of this Act or such other information as may be in his possession in relation to the trade carried on by any other person [sub-section (3)].

For the purposes enforcing the attendance of witnesses, the local limits of the Commissioner's jurisdiction shall be the limits of the territory of India [sub-section (4)].

During any inquiry under this Act, the Commission may have any grounds to believe that any books or papers of, or relating to any undertaking in relation to which such inquiry is being made or which the owner of such undertaking may be required to produce in such enquiry, are being, or may be, destroyed, mutilated, altered, falsified or secreted. In such a case, the Commission may, by a written order, authorise any of its officers to exercise the same powers of entry, search and seizure in relation to the undertaking or the books or papers, aforesaid as may

be exercised by the Director General while holding a preliminary investigation under Section 11 [sub-section (5)]. Thus, this provision is designed to empower the Commission to authorise any other officer of it, than the Director General, to exercise the same powers as the Director General may exercise for the purpose of Preliminary Investigation.

The scope of Section 12 may be explained thus : Sub-section (1) covers all kinds of inquiries under the Act including inquiries under Chapters III, IV and VI. Sub-section (3) is applicable only to inquiries under Chapters IV and VI relating to monopolistic and restrictive trade practices. The provisions of sub-sections (1) (2) and (4) are applicable to all proceedings under the Act, whereas the provisions of sub-section (3) are applicable only to trade practices and are not qualified by the expression "for the purposes of any inquiry under this Act" ; but sub-section (3) only enjoins that the information or documents called for should be in connection with trade practices, the examination of which, may be required for the purposes of the Act.

Commission's power to grant temporary Injunction : It may so happen that during an inquiry before the Commission, it is proved, through affidavit or otherwise, by the complainant, Director General, any trade or class of traders or any other person that: (a) any undertaking or any person is carrying on, or is about to carry on, any monopolistic or restrictive or unfair, trade practice ; and (b) such monopolistic or restrictive or unfair, trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or the interest of any consumer or consumers generally. In such a situation, the Commission may stay or prevent the undertaking or, as the case may be, such person from causing such prejudicial effect. And this the Commission may do by granting a temporary injunction restraining such undertaking or person from carrying on any of the aforementioned trade practices until the conclusion of such inquiry or until further orders. Thus this provision as contained in Section 12A (I) (newly incorporated by the 1984 Amendment Act) enables the Commission as well to exercise the power of granting injunction which is vested in a Civil Court under the C.P.C.

Section 12A (2) provides that the provisions of Rules 2A to 5 (both inclusive) of Order XXXIX of the First Schedule to the C.P.C. shall, as far as may be, apply to a temporary injunction issued by the Commission, as they apply to a temporary injunction issued by a Civil Court. Any reference in any such rule to a suit shall be construed as a reference to an enquiry before the Commission.

Commission's power to award compensation : According to Section 12B (inserted by the 1984 Amendment Act), if, as a result of any of the kinds of trade practice mentioned in Section 12A, any loss or damage is caused to the Central Government or any State Government or any trader or class of traders or consumer, then any such aggrieved entity may apply to the Commission for an order for the recovery from the undertaking or owner thereof or from the person which or who carried on any of the aforesaid trade practice of such amount as the Commission may determine as compensation for the loss or damage so caused. This right of application to the Commission for the recovery of loss or damage is in addition to their right to institute a suit for the recovery of the loss or damage [sub-section(I)].

If the loss or damage mentioned above is caused to numerous persons having the same interest, then one or more of such persons may, with the permission of the Commission, make an application for and on behalf of, or for the benefit of, the persons so interested; thereupon the provisions of Rule 8 of Order I of the First Schedule to the C.P.C. shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Commission thereon [sub-section] (2)].

On the receipt of the application for the recovery of loss or damage caused by any of the kinds of trade practices as aforesaid, the Commission has to make an inquiry into the allegations made in the application; thereafter it may make an order directing the owner of the undertaking or other person to make payment, to the applicant, of the amount determined by it as realisable from the undertaking or the owner thereof; or, as the case may be, from the other person [sub-section (3)].

It has been stated above that the aggrieved entity can apply for compensation to the Commission as well as to the Court. Suppose that a decree has been passed on the application made to the Court for any loss or damage in favour of any person(s) referred to either in sub-section (1) or in sub-section (2). In such a case, the amount (if any) paid or recovered in pursuance of the Commission's order under sub-section (3) shall be set off against the amount payable under such decree; the decree shall be exempted for the balance, if any, left after such set-off [sub-section (4)].

Enforcement of the order made by Commission under Section 12A or 12B: By virtue of Section 12C, [added by the 1984 Amendment Act] the aforesaid order of temporary injunction or of payment of any amount may be enforced by the Commission in the same manner as if it were a decree or order made by a Court in a suit. In the event of the Commission being unable to execute any such order, it can send the order to the Court. The Court must be one within the local limits of whose jurisdiction, (a) the registered office of the company is situated where the order is against a company, or (b) the place, (if the order is against any other person) where the person concerned voluntarily resides or carries on business or personally works for gain, is situated. Thereupon, the Court to which the order is sent by the Commission shall execute the order as if it were a decree or order sent to it for execution.

Orders of Commission may be subject to conditions, etc. : Section 13 (1) provides that in making any order under this Act, the Commission may make such provisions not inconsistent with this Act as it may think necessary or desirable for the proper execution of the order. If any person commits breach of or fails to comply with, any obligation imposed on him by any such provision, then he shall be deemed to be guilty of an offence under the Act.

According to Section 13 (2), any order made by the Commission may be amended or revoked at any time in the manner in which it was made. This provision has undoubtedly to be read with Regulation 85 of the MRTP Commission Regulations. As spelt out by Regulation 85, Section 31 (2) permits amendment as a result of material change in the relevant situation or in any fact or circumstances on which the applicant for amendment relies. Regulation 85 also provides that Section 114 and Order XLVII of the Civil Procedure Code shall, as far as possible, apply to

the proceedings before the Commission. This, in turn, would warrant an amendment if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowlede of the applicant or could not be produced by him at the time when the order was passed by the Commission. It can also be justified on account of some mistake or error apparent on the fact of the record or for any substantial reason. Even the grounds spelt out in Regulation 85 are sufficiently wide to enable the Commission to amend its order in appropriate cases apart from the somewhat wide ambit of Section 13 (2) [*RRTA v. Mysore Kirloskar Ltd. (1978) 48 Comp. Cas. 837 (MRTPC) ; Mahindra & Mahindra Ltd. v. Union of India. AIR 1979 S.C. 798*]. It thus seems that the requirement of law for the purposes of amendments are quite flexible.

On the failure of a party to attend the hearing, the Commission passed an *ex parte* order. And the respondent filed an application under Section 13 (2) for the revocation of the order on the ground that his Counsel was grossly negligent, and had never informed the respondent about the date of hearing and hence, the respondent had no real opportunity to submit its case. The commission held that on the failure of a party to attend the hearing, an *ex parte* order may be passed. But Order IX, rule 13 of the C.P.C. provides that if the party is able to show that he was prevented by sufficient cause from being present at the hearing, the *ex parte* order has to be revoked and an opportunity given to the party to present his case. In view of Regulation 15 of the MRTP Commission, the relevant provisions of the C.P.C. providing for these contingencies have necessarily to be applied and there is nothing in Section 13 (2) to preclude such application [*In re Ramgopal Maheshwari & Sons (1979) 49 Comp. Cas. 202 (MRTPC)*].

Section 13 (3) provides that any order made by the Commission may be either general in its application or limited to any *particular class of traders* or a particular class of trade practice or a particular trade practice or a particular locality. It may be noted that a doubt was expressed before Sachar Committee as to whether this will include an order *in respect of a particular trader*. Consequently, it was suggested by the Sachar Committee that the words "or a particular trader' should be added after the words italicised above. But the MRTP (Amendment) Act 1984 has not taken any cognisance of this suggestion with the result that the aforesaid doubt still remains.

Commission's power to cause Investigation to find out whether or not orders made by it have been complied with : The Commission may have any reasonable cause to believe that a person has omitted or failed to comply with any order made by it or any obligation imposed by it on him by or under this Act. In such a situation, Section 13A (added anew by the 1984 Amendment Act) empowers the Commission to authorise the Director General or any officer of the Commission to make an investigation into the matter. When so authorised, the delegate may, for the purpose of making such investigation, exercise all or any of the powers conferred on the Director General by Section 11. The delegate so authorised shall, on the conclusion of the investigation, submit to the Commission the investigation report so as to enable the Commission to take such action in the matter as it may think fit.

Order where party concerned does not carry on business in India : According to Section 14 (as amended by the Amendment Act of 1984), where any practice subs-

tantially falls within monopolistic, restrictive or unfair trade practice relating to the production, shortage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, then an order may be made under this Act, with respect to that part of the practice which is carried on in India. It may be observed that this Section does not deal with the power of the Central Government or the Commission to pass an order but refers to the scope of the order that can be made either by the Central Government or the Commission in so far as any of the aforesaid category or trade practices is indulged in or carried on in India, even though the party carrying on the practice in India may not be carrying on business in India.

Restriction of application of orders in certain cases : By virtue of Section 15, no order made under this Act with respect to any monopolistic or restrictive trade practice shall operate so as to restrict : (a) the right of any person to restrain any infringement of a patent granted in India; or (b) any person as to the condition which he attaches to a license to do anything, in India ; or (c) the the doing of which but for the license would be an infringement of a patent granted right of any persons to export goods from India, to the extent to which the monopolistic or restrictive trade practice relates exclusively to the production, supply, distribution or control of goods for such export.

It may be noted that Section 15 limits the scope of the orders that can be passed by the Commission or by the Central Government in respect of restrictive trade practice or monopolistic trade practice. The provisions contained in (a) and (b) above are in conformity with the universally accepted policy in all countries to protect the monopoly rights arising out of the patents granted by the State with a view to promoting and encouraging inventions.

The provision contained in (c) above further limits the scope of the orders by protecting the right of exporters subject to the condition that the monopolistic or restrictive trade is shown to arise exclusively out of production, distribution or supply made for exports.

It may be noted that in view of the very legislative provision in Section 15, an order passed by the Central Government or the Commission, to the extent such an order operates to impose restriction of the nature described in Section 15, may be treated as void and of no consequence.

Sittings of the Commission : Under Section 16(1), the central office of the Commission shall be in Delhi. But the Commission may sit at such places in India and at such times as may be most convenient for the exercise of its powers or functions under this Act.

Sub-section (2) provides that the powers or functions of the Commission may be exercised or discharged by Benches formed by the Chairman from amongst the members. In *Bengal Potteries Ltd. v. MRTPC (1975) 45 Comp. Cas 697*, an order passed by a two-member Bench was challenged on the ground that according to Section 5, the Commission could not be validly constituted with less than 3 members including the Chairman and that the entire proceedings before the Commission constituting 2 members were illegal and without jurisdiction. Dismissing this argument, the Calcutta High Court observed : (a) that under Section 16 (2),

powers and functions of the Commission can be exercised by a Bench formed by the Chairman. Consequently, the Chairman may form a Bench even with less than 3 members; (b) that Section 6(6) [which provides that majority opinion will prevail] will come into play only if there is a difference of opinion among the members. In the event of there being a divergence of opinion, the matter may obviously be referred to a third member. Power of forming a Bench under Section 16(2) is not dependent on, or controlled by, Section 6(6), because the provisions contained in Section 6(6) are contingent and dependent upon happening of a difference of opinion among the members. Accordingly, there is no statutory bar against conducting a proceeding or hearing a matter by a Bench formed by the Chairman and one member of the Commission.

On the analogy of the aforementioned Calcutta High Court judgment, there can be no objection to a Bench being constituted by one member disposing of any matter for which the Bench has been constituted by the Chairman provided the function concerned has been developed on the member concerned by the Commission as a whole. The legislature could not have possibly intended that the proceedings under the MRTP Act should be kept in abeyance or that there should be a complete standstill in its working just because either the Chairman and or one of the members is not available. Legislation aimed at preventing concentration of economic power to the common detriment could not be put in cold storage for administrative exigencies of this kind [*Delhi Pipe Dealers' Association;* also see *Re. Graphite India Ltd. 1977 Tax L.R. 1990 (MRTPC)*].

Because of the aforesaid two decisions of the Calcutta and Delhi High Courts, Sachar Committee's recommendation was to remove the doubt by adding a new sub-section (3) to section 16 to the effect that "the Chairman may constitute a Bench with one or more members for exercising the powers and discharging the functions of the Commission". However, this recommendation of the Sachar Committee was not taken into account while passing the 1984 Amendment Act.

Hearing to be in public except in special circumstances : Under Section 17(1), the hearing of proceedings before the Commission has to be in public and not in camera. But to this rule there is an exception as contained in Section 17(2). Accordingly, the Commission may (a) hear the proceeding or any part thereof in private, (b) give directions as to the person who may be present thereat, (c) prohibit or restrict the publication of evidence given before the Commission (whether in public or in private) or of matters contained in documents filed before the Commission.

As regards prohibition or restriction of publication referred to above, it would not encompass any complaint to a lawful authority empowered by law to take action under *any* statute or other law with a view to moving it to take action. For instance, in the event of a blanket prohibition or restriction being imposed, even a defamatory statement irrelevant to the subject-matter of the inquiry would be protected. Sending to or filing before a lawful authority a certified copy of the evidence to take any action in respect of such defamatory statement cannot be prohibited or restricted, because that will be unfair to the person about whom such statements are made. In case of statements which are relevant to the subject-matter of the inquiry, even a defamatory statement will be protected by Section

59 of the MRTP Act, for which no order prohibiting or restricting publication is necessary from the Commission. Consequently, a blanket prohibition or restriction cannot be levied. Prohibiting or restricting the publication of evidence before the Commission, or of all matters contained in documents filed before the Commission, except for the purpose of a lawful complaint to any authority empowered under the law to take action, would be sufficient [*Delhi Pipe Dealers' Association v. Indian Tube Co. Ltd. (1976) 46 Comp. Cas. 151 (MRTPC)*].

Procedure of the Commission : According to Section 18 (as amended by the Amendment Act of 1984), *subject to the provisions of this Act*, the Commission shall have the power to regulate the following :

(a) the procedure and conduct of its business;

(b) the procedure of Benches of the Commission;

(c) the delegation to one or more members of such powers or functions as the Chairman may specify.

The italicised phrase above needs little elaboration. The words "subject to", according to correct judicial interpretation, mean "conditional upon". Therefore, what Section 18 (1) provides is that the regulation-making power of the Commission under Section 18 is conditional upon what is already provided for in Section 12(1) (discussed earlier). These words are not limiting words and do not mean that the Commission cannot regulate the rest of its procedure, which is not provided for in Section 12(1). The true scope of the conditions imposed by the phrase "subject to the provisions of the Act" on the regulation-making power of the Commission is that when the same subject is covered both by the provision contained in Section 12(1) and also by the Regulations made by the Commission and there is no conflict between them, then the former (i.e. the Act) shall prevail over the latter (i.e. Regulations). This condition cannot operate when the subject-matter of the two provisions is not the same. This interpretation seems to be the only correct interpretation of the words italicised above, because Sections 10 and 37 envisage a judicial inquiry.

The paragraph added to Section 18(1) by the 1984 Amendment Act is intended to clarify that any order passed by a member of the Commission under delegation shall be deemed to be an order of the Commission. It has been enacted that a member to whom any powers or functions have been delegated under Section 18(1) (c) shall excercise such powers or discharge those functions in the same manner and with the same effect as though they had been conferred on such member directly by this Act and not by way of delegation. Any order or other act or thing made or done by him pursuant to the power or function so delegated shall be deemed to be that made or done by the Commission. This vicarious responsibility of the Commission for the act of its delegate is however subject to any general or special direction given, or condition imposed, by the Commission.

Section 18(2) provides that in particular, and without prejudice to the generality of the foregoing provisions, the powers of the Commission shall include the power to determine the extent to which persons interested or claiming to be interested in the subject-matter of any proceeding before it are allowed to be present or to be heard, either by themselves or by their representatives or to cross-examine witnesses or otherwise to take part in the proceeding.

Orders of the Commission to be noted in the Register : This is dealt with by Section 19 in which consequential amendments have been made by the 1984 Amendment Act. These consequential amendments are italicised below. Under this Section, the Commission must cause an authenticated copy of every order made by it in respect of a restrictive trade practice *or an unfair trade practice, as the case may be,* to be forwarded to the *Director General* who shall have it recorded in such manner as may be prescribed.

It would thus be evident that Section 19 prescribes two requirements. The first is for the Commission to send an authenticated copy of its order to the Director General. The second is for the Director General to have that authenticated report in such manner as may be prescribed. That is to say, the Central Government must frame the rules prescribing the manner in which the copy of the authenticated order sent by the Commission to the Director General must be recorded by the latter. Sub-rule (6) of rule 11A, introduced by the MRTP (Amendment) Rules, 1984, requires the Director General to maintain particulars in separate registers in respect of restrictive trade practices, monopolistic trade practices and unfair trade practices investigated by him or inquired into by the Commission. The particulars to be entered in the registers are specified in the prescribed forms which include, *inter alia*, columnsfor entering the substance of the orders passed by the Commission. The importance of noting in the register lies in that the registers are open to public inspection as provided in Section 65.

CENTRAL GOVERNMENT

The Central Government is another entity which is responsible for the goverance of the MRTP Act. It is mainly responsible for administering Chapter III of the Act pertaining to concentration of economic power. This Chapter has three parts. Part A contains Sections 20 to 26 which empowers the Central Government to deal with matters comprised therein. Part B consists of Sections 27 (relating to division of undertakings), 27A (relating to Central Government's power to direct severance of inter-connection between undertakings) and Section 27B (relating to the manner in which order made under Section 27 or 27A shall be carried out). Part C consists of Sections 28 (pertaining to matters to be considered by the Central Government before according approval), Section 29 (regarding the right of audience) and Section 30 (relating to time for taking action).

By virtue of Chapter III, the Central Government has the power to make orders in regard to the matters specified hereunder :

(a) Substantial expansion by the owner of an undertaking (Section 21);

(b) Establishment of new undertakings (Section 22);

(c) Merger, amalgamation and take-over of undertakings (Sections 23 & 24);

(d) Appointment of a person as a director of an undertaking to which Part A of Chapter III applies, unless he does not hold such office in more than 10 inter-connected undertakings (Section 25); and

(e) Division of undertakings (Section 27) and severance of inter-connection between undertakings (Section 27A).

In respect of (a) to (d) above, the Central Government assumes jurisdiction

only on the basis of an application received by it from any interested person; whereas the powers of the Central Government, referred to in (c) above can be exercised on its own opinion.

Prior to exercising powers of according approvals under Chapter III, the Central Government is required to consider the criteria enshrined in Section 28. Section 30 prescribes the time-limit within which the Central Government can take action for preventing concentration of economic power. According to Section 30, if the Central Government is of the opinion that a further inquiry is to be held by the Commission before sanctioning approval under Section 21, 22 or 23, then the former should refer the matter to the Commission within 60 days from the date of receipt of the notice under Section 21, application under Section 22 or the proposal under Section 23, as the case may be. The Commission thereupon has to make its report within 90 days from the date of the receipt from the Central Government of the reference, whereupon the Central Government has to dispose of the matter within 60 days from the date of the receipt of the Commission's report. Thus the whole procedure should not last for more than 210 (60+90+60) days. But if the Central Government does not refer the case to the Commission for inquiry, then the Government, under Section 30(4), has to dispose of every notice, application or proposal within 90 days except in certain cases where the Central Government is of the opinion that the matter cannot be disposed of within the said 90 days.

Section 61 also empowers the Central Government to require the Commission to submit a report on the general effect on the public interest of such trade practices as, in the opinion of that Government, either constitute or contribute to monopolistic or *restrictive or unfair trade practices* (these italicised words being added by the 1984 Amendment Act) or concentration of economic powers to the common detriment.

Apart from the Central Government's powers mentioned above, it has power under Section 31 to require the Commission to investigate into a monopolistic trade practice, where it appears to the Central Government that the owners of one or more undertakings are indulging in any practice which is or may be a monopolistic trade practice or that monopolistic trade practices prevail in respect of any goods or services. By virtue of the Proviso to Section 31 (added by the 1984 Amendment Act), the Court also *suo moto* may conduct the investigation into a monopolistic trade practice. On the receipt of the investigation report from the Commission (made either on its own motion on the basis of its own information or at the dictates of the Central Government), the Central Government may pass orders to remedy or prevent any mischiefs which result or may result from such trade practice.

Under Section 43 (as amended by the 1984 Amendment Act), the Central Government for carrying out the purposes of the Act, has the power to call upon the owner of any undertaking to furnish to that Government (periodically or as and when required) any information concerning the activities carried on by the undertaking, the connection between it and any other undertaking, including such other information relating to its organisation, business, cost of production, conduct, trade practice or management as may be prescribed.

The MRTP (Information) Rules, 1971, notified by the Central Government in exercise of the powers confered by Section 43 (relating to power to call for information) read with Section 67 (i.e. rule-making powers), enable the Central Government to call upon the owner of any undertaking to furnish information, etc., referred to in the immediately preceding paragraph. The Central Government has also issued an order under Section 43 calling upon the owners of every undertaking registered under section 26 to furnish to it two copies each of its Balance Sheet and Profit & Loss Account within 30 days from the date on which these documents are placed before the Annual General Meeting. Section 44 (as amended by the 1984 Amendment Act) confers on the Central Government the power to appoint one or more Inspectors to investigate into the affairs of an undertaking if the Government is of the opinion that the undertaking is indulging in any monopolistic or restrictive or unfair trade practice or is in any way trying to acquire any control over any dominant or inter-connected undertaking.

Under Section 54 (1), the Central Government has the power, while according any approval, sanction, permission, confirmation or recognition, or while giving any direction or using any order, while granting any exemption under the Act, to impose such conditions, limitations or restrictions as it may think fit. Section 54 (3) provides that any breach of such conditions, limitations or restrictions may culminate in rescission or withdrawal of such approval, sanction, permission, confirmation, direction, order or exemption made or granted by it.

Under Section 55, the orders of the Central Government can be appealed against. The appeal is to be preferred only to the Supreme Court. The time-limit for such appeal is "within 60 days from the date of the order". This appeal lies on one or more of the grounds specified in Section 100 of the Civil Procedure Code.

It may be noted that the Central Government, in exercise of its rule-making powers, has framed the MRTP Rules, 1970, MRTP (Information) Rules, 1971 and MRTP (Classification of Goods) Rules, 1971 as amended by the 1984 Amendment Rules.

COURTS

Apart from MRTP Commission and the Central Government as the two entities (mentioned above) responsible for the enforcement and administration of the Act, the Indian Courts have also a role to play in the enforcement and administration of the Act. Under Section 55, any person aggrieved by the decision on any question mentioned in Section 2A (a) or (b) or (c), or any order made by the Central Government under Chapters III or IV, or any order made by the Commission under Section 13 or Section 36D (relating to inquiry into any unfair trade practice) or Section 37 may appeal to the Supreme Court. Besides this statutory right given to the aggrieved person, resort to the Courts may be had through the writ jurisdiction of the Supreme Court and the High Courts. The aggrieved person may also move the Supreme Court by way of a special leave under Article 136 of the Constitution; for this discretionary remedy, leave is granted only in cases where substantial injustice is shown.

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STUDY MATERIAL F.S P. (NN) CL-13

FINAL COURSE (NN)
CORPORATE LAW
STUDY — XIII

Concentration of Economic Power, Restrictions on the acquisition and transfer of Shares or, by. certain bodies corporate, Monopolistic Trade Practices.

This Study Covers :

Introduction — Registration — De-registration / Cancellation of registration — Substantial expansion of undertakings — Non-applicability of Sections 21 and 22 — Merger, amalgamation and take-over — Take-over of undertakings — Effect of contravention of Section 23. Appointment of Directors — Part B of Chapter III

Division of Undertakings — Central Government's power to direct severance of inter-connection between undertakings — Manner of carrying out order of divisions or of severance.

Part C of Chapter III — Grounds for rejection of proposals — Chapter III-A of the MRTP Act.

Restrictions on acquisition of certain shares — Restriction on transfer of shares — Time limit for communication of refusal — Government companies exempted from the Sections 30B to 30E.

Chapter IV of the MRTP Act — Investigation by Commission of Monopolistic Trade Practices — Monopolistic trade practice to be deemed to be prejudicial to the public interest except in certain cases.

Prescribed Reading : MRTP : A compendium by A M Chakraborti, 1984 Edition (Taxman Publication)

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Introduction : As has already been stated in Study Paper 11, one of the avowed objectives behind the MRTP Legislation is to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment. The authority for this is derived from the Directive Principles of State Policy enshrined in Article 39 of the Constitution. The specific measures for attaining this objective are contained in Chapter III of the Act.

Part A of Chapter III (i.e. Sections 20 to 26) applies to the undertakings of the size and market share and potential power of dominion over the economic resources of the country. Section 20 as amended by the Amendment Act 1984 restricts the application of this part on concentration of economic power to : (i) an undertaking or a group of inter-connected undertakings having assets of not less than Rs. 20 crores (i.e. Rs. 20 crores or more) in *value* ; and (ii) a dominant undertaking (where it is a single undertaking) having assets of not less than Rs. 1 crore in value and a dominant undertaking (where it consists of more than one undertaking) the sum-total of the *value* of whose assets is Rs. 1 crore or above.

Thus it would be evident from the abovementioned provisions of Section 20 that the existence of economic power or the potential to exercise such power is identified in terms (a) size (i.e. value of assets) and (b) market share (i.e. dominance of a single undertaking or inter-connected undertakings. As regards value of assets, the cut-off limit is Rs. 20 crores or above as a result of which the regulatory provisions of the Act become applicable to a single undertaking or a group of inter-connected undertakings having, individually or collectively, asset value of at least Rs. 20 crores. The dominance of an undertaking is determined in accordance with its market share in a specified product. An undertaking or a group of inter-connected undertakings which produce, supply, distribute or otherwise control 1/4th or more of the total goods of any description or which have Rs 1 crore or more of asset value, singly or collectively [dominant undertaking (s)], is subjected to the discipline prescribed by the Act.

According to the Explanation to Section 20, in the case of an undertaking or a *single dominant* undertaking, the value shall be the value of the assets of such undertaking on the last day of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether Part A does or does not apply to such undertaking. In the case of an inter-connected undertakings, the value of the assets of such undertaking on the last day of its financial year which closes during the calender year immediately preceding the calendar year in which the question arises as to whether this Part does or does not apply to the undertaking shall be relevant.

The expression "value of assets" in terms of Section 2 (w) means in relation to an undertaking the value of its assets as shown in its books of account after making provision for depreciation. This definition is important in determining the question of registrability of an undertaking under Section 26, because an undertaking becomes registrable by itself or along with inter-connected undertakings, depending on whether or not its assets exceed Rs. 20 crores without

necessarily being dominant or Rs. 1 crore where it is dominant. Inasmuch as the registrability is determined with reference to a point of time, the value of assets at that point of time has to be seen and for this reason alone one had to understand this definition carefully. This definition, as prescribed in accounting parlance, would mean that the assets are to be taken at their book value rather than at their realisable or other values. The only adjustment or deduction which can be made is on account of the provisions for depreciation. In other words, if the audited accounts do not reflect this matter (i.e. depreciation), no deduction can be made in calculating the value of assets for finding out the applicability of Part A of Chapter III. Thus, the debit balance of profit and loss account, deferred revenue expenditure or miscellaneous expenditure which appear in the balance sheet as assets in accordance with accounting practice, cannot really be included for reckoning the value of the assets. Advance payment of income-tax which falls within the category of "pre-paid expenses" cannot, for the same reason, be taken into consideration. On a slightly different reasoning, the Delhi High Court in Triveni Engineering Works Ltd. v. Union of India has also taken the view that advance payment of income-tax cannot be reckoned for deducting the value of the assets.

Registration : Part A of Chapter III deals with one of the most important aspects of concentration of economic power. In order to exercise some effective control some obligation is required to be cast on undertakings to which this Part applies to get themselves registered with the Government. Accordingly, Section 26 (as amended by the 1984 Amendment Act) provides that the owner of every undertaking to which this Part applies (i.e. an undertaking of the size indicated in Section 20(a) or an undertaking of market share in Section 20(b) at the commencement of the MRTP (Amendment) Act, 1984 or to which the provisions of that Part become applicable thereafter shall, within 60 days from such commencement or the date on which that Part becomes first applicable to it, or within such further time as the Central Government may, on sufficient cause being shown, allow, make an application (in such form and containing such particulars as may be prescribed) to the Central Government for the registration of such undertaking as an undertaking to which that Part applies [sub section (1)]. This application for registration shall have to be made to the Department of the Company Affairs.

Sub-section (2) provides for the issue of Certificate of Registration. On the receipt of the aforesaid application, the Central Government must forthwith enter the name of the undertaking in a Register to be maintained for the purpose and issue to the concerned undertaking a certificate of registration containing such particulars as may be prescribed.

According to Section 48(2) [as substituted by the 1984 Amendment Act], if the owner of an undertaking fails without reasonable cause to make the above-mentioned application for registration, then such failure would attract penalty. (A) *Where the undertaking is owned by a company* : (i) the company shall be punishable with fine extending to Rs 1,000 and where the offence is a continuing one, with a further fine extending to Rs. 50 for every day, after the first, during which such failure continues ; and (ii) every officer of the company in default shall be punishable with imprisonment for a term extending up to 2 years or with fine extending to Rs. 1,000, or with both, and where the office is a continuing

one, with a further fine extending to Rs. 50/- for every day after the first during which such failure continue. (B) *Where the undertaking is owned by a firm*, every partner of such firm or where the undertaking is *not* owned either by a company or by a firm, every person who owns or controls the undertaking, shall be punishable with imprisonment for a term extending up to 2 years or with fine extending to Rs. 1,000, or with both, and where the offence is a continuing one, with a further fine extending up to Rs. 50/- for every day after the first during which such failure continues.

For removal of doubt, sub-section (4) of Section 26 declares that nothing contained in Section 26 shall apply to an undertaking which was registered under this Section before the commencement of the MRTP (Amendment) Act; according fresh registration of such undertaking shall not be necessary.

De registration/cancellation of registration : Section 26(3) provides for such a possibility when it states that the owner of any undertaking which has ceased to be an undertaking to which this Part applies may, at any time after such cessor, apply to the Central Government for cancellation (i e. de-registration) of the registration. Thereupon, the Central Government may, after making such inquiry as it may think fit, cancel the registration of such undertaking and notify such cancellation in the Official Gazette. It may be noted that there is no prescribed form for the purpose. A few of the possible circumstances calling for de-registration are stated below :

(a) Fall in the asset value below Rs. 20 crores. For example, AU was registered under Section 26 because it was discovered to be inter-connected with BU the latter having assets exceeding Rs. 20 crores, on the basis of common majority directorship with BU. The strength of the Board of Directors of BU *having increased, AU is no longer having common majority directorship with* that of BU. In this circumstance, AU can apply for de-registration or cancellation of its registration.

(b) Fall in the value below Rs. 1 crore and market share below 1/4th. For example, AU and BU are holding and subsidiary companies respectively and are together having assets of above Rs. 20 crores. AU owns more than 1/4th of the equity capital of CU. CU was therefore registered under Section 26, being an inter-connected undertaking. AU has now transferred 6% of its own holdings in CU to another undertaking, not inter-connected. CU can now apply for the de-registration.

(c) Cessation of inter-connection. For example, AU, BU and CU which are inter-connected with one another according to Section 2(g) have assets worth Rs. 25 crores (AU Rs 9 crores—BU Rs. 9 crores—CU Rs. 7 crores). If CU ceases to be inter-connected, the asset value will obviously fall below Rs. 20 crores as well as the assets of AU and BU which remain inter-connected will be worth Rs. 18 crores. After cesser, CU will own assets worth Rs. 7 crores. In such a situation, all the three undertakings may separately apply for de-registration.

(d) Registration under a wrong premise or interpretation of law. If an undertaking has registered itself under a wrong premise or on a not-too-correct interpretation of law, it can seek de-registration clearly stating reasons therefor.

REGULATION OF GROWTH

An undertaking to which Part A of Chapter III applies will not be denied further growth provided it complies with the requirements of Sections 21, 22 and 23. It may be noted that these Sections are not at all intended to stunt growth *per se* but to regulate growth so that it does not degenerate into concentration of economic power to the common detriment.

Substantial expansion of undertakings : Under Section 21 (as amended by the 1984 Amendment Act) subject to Section 23 the *owner* of an undertaking to which this Part applies may propose to substantially expand the activities of such undertaking by issue of fresh capital or by the installation of new machinery or other equipment or *in any other manner*. If the *owner* [i.e. an individual, HUF, body corporate or other association of individuals whether or not incorporated, or trust, whether public or private or whether religious or charitable who or which owns or controls the whole or substantially the whole of such undertaking, and includes any associated person who is a constituent of a group and who has the ultimate control over the affairs of such undertaking—vide Section 2(ju)] so purposes, then he shall, before taking any action to give effect to the proposal for such expansion, give to the Central Government notice in the prescribed form of his intention to make such expansion; he should state therein the scheme of finance with regard to the proposed expansion, whether it is connected with any other undertaking or undertakings and if so, give particulars relating to all the interconnected undertakings and such other information as may be prescribed [sub-section (1)]. The phrase "in any other manner" (italicised above) should be read *ejusdem generis* with the preceding words, *viz.*, "issue of fresh capital" and "installation of new machinery or equipment" [*In re. Canara Bank Ltd. (1973) 43 Comp. Cas. 157*].

Sub-section (2) provides that, despite anything contained in any other law for the time being in force, the owner of the undertaking shall not give effect to any proposal for the substantial expansion, unless such proposal has been approved by the Central Government. According to the Explanation to this sub-section, an undertaking shall be *deemed to expand substantially* in any manner in the following circumstances, namely—

(a) **In the case of an undertaking within the purview of Industries (Development & Regulation) Act and having a licensed capacity for the production of goods of any description :** If as a result of such expansion, there would be an increase of such licensed capacity by not less than 25% thereof.

(b) **In the case of an undertaking to which Section 20(b) [relating to dominant undertaking] applies but the (a) above does not apply :** If as a result of such expansion, the production, marketing, supply, distribution or control of any goods or the provision of any services would increase by 25% or more of the goods produced, marketed, supplied, distributed or controlled or services provided by it immediately before such expansion.

(c) **In the case of any other undertaking :** If as a result of such expansion
(i) it would have additional assets of a value of 25% or more of the

value of its assets immediately before such expansion, or (ii) the production, marketing, supply, distribution or control of any goods or the provision of any services would increase by 25% or more of the goods produced, marketed, supplied, distributed or controlled or services provided, by it immediately before such expansion.

Under Section 21(3), the Central Government may (and in fact does) call upon the owner of the undertaking concerned to satisfy it that :

1. the proposed expansion or the scheme of finance with regard to such expansion is not likely to lead to the concentration of economic power to the detriment ; or
2. the proposed expansion or the scheme of finance with regard to such expansion is not likely to be prejudicial to the public interest in any manner.

Thereupon, the Central Government may, if it is satisfied that it is expedient in the public interest so to do, by order accord approval to the proposal for such expansion. The Central Government may, if it is of the opinion that no such order can be made without further inquiry, refer the application to the MRTP Commission. On the receipt of the report from the Commission, the Central Government may pass such orders with regard to the proposal for such expansion of the undertaking as it may deem fit. Such a scheme once approved by the Central Government cannot be modified without the previous approval of the Central Government.

The "scheme of finance", referred to above, means, according to Section 2(q), a scheme indicating the sources from which, and the terms and conditions on which, finances are proposed to be obtained by the undertaking. Every such scheme of finance, after the commencement of the MRTP (Amendment) Act, 1984, must include the estimated capital outlay which would be needed to give effect to the scheme.

Under Section 21(4) [as substituted by the Amendment Act of 1984], expansion by replacement, renovation etc. are exempt. In other words, the provisions of Section 21 shall not apply to any undertaking in so far as the expansion *is effected by the replacement, renovation or modernisation of the whole or any* part of machinery or other equipment of the undertaking or is effected by installation of any balancing equipment (i.e. equipment or device needed for removing any production bottleneck, including equipment or device in tool room, ancillary services or inspection department where such installation has a bearing on the quantum and quality of production to be achieved) and if as a result of the expansion so effected, *the increase in the licensed capacity* of the undertaking does not exceed, in the aggregate, 25% of its licensed capacity before any expansion thereof. The increase in the licensed capacity shall be deemed to be in addition to, and not in derogation of, the increase in the licensed capacity which may be made without the Central Government's approval under sub-section (2) read with the Explanation below that sub-section.

It may be noted that reference in sub-section (4) to licensed capacity shall, in relation to any undertaking which does not have any licensed capacity, be cons-

trued as references to production, storage, marketing, supply, distribution or control of goods, or provision of services, by, or the valuation of the assets of, such undertaking (as the case may be).

Thus, it will have been seen that substantial expansion cannot be totally exempt from the purview of the Act simply because there is some modernisation, replacement, renovation or installation of balancing equipment. This provision seeks to limit substantial expansion involving modernisation, etc., up to 25% of the existing licensed capacity. This of course would be in addition to the normal increase in licensed capacity up to (but not including) 25%.

Establishment of New Undertakings : Section 22 (as substituted by the 1984 Amendment Act) is designed to regulate concentration of economic power to the common detriment by keeping surveillance over establishment of a new undertaking or addition of a new unit or division to an undertaking. Under this section, no person or authority, other than Government, shall establish (i) any new undertaking which, when established, would become an inter-connected undertakings of an undrtakings to which part A of chapter III applies, or (ii) add any new unit or division to an undertaking to which this Part applies, except under and in accordance with the previous permission of the Central Government [sub-section (1)]. According to the Proviso to this sub-section, except where, as a result of the establishment of new undertaking, unit or division, an undertaking would come into existence to which Section 20(b) would apply, no permission shall be required if the new undertaking or (as the case may be) the new unit or division, when established, would not produce the same goods or provide *the same services in relation to* which the undertaking—(a) of which such new undertaking would be an inter-connected undertaking, or (b) to which such unit or division is proposed to be added, is a dominant undertaking. Thus, while dominant undertaking shall be free to diversify in an activity, different from the activity in which it is dominant, it cannot, without the previous approval of the Central Government, establish a new undertaking for pursuing the same line of its activity.

Under Section 22(IA), no owner of any undertaking (i.e. the total value of *such undertaking or the assets of such undertaking together with the assets of its* inter-connected undertaking is Rs. 20 crores or more) can establish, except under, and in accordance with, the previous permission of the Central Government, any *new undertaking* for the production, storage, supply, distribution, marketing or control of any article, or for the provision of any service, for which there is no licensed capacity. And the Central Government shall not grant such permission, if the articles (which are proposed by such new undertaking to be produced, stored, supplied, distributed, marketed or controlled) or the services (which are proposed by such new undertaking to be provided) are not different from those of the first-mentioned undertaking and the provisions of sub-sections (2) and (3) (discussed below) shall apply to the establishment of such new undertaking as they apply to the establishment of a new undertaking or any new unit or division mentioned in sub-section (1) above.

Under Section 22(2), before actually establishing a new undertaking, unit or division, an application has to be made to the Central Government in the prescribed form for that Government's approval to the proposal. The application shall set out information with regard to the inter-connection of the new undertaking,

unit or division (which is intended to be established) with every other undertaking, the value or quality of goods that may be produced by the new undertaking, unit or division, the scheme of finance for the establishment of the new undertaking, unit or division and such other information as may be prescribed.

By virtue of Section 22(3), the Central Government may call upon the applicant to satisfy that the proposal to establish a new undertaking, unit or division, or the scheme of finance with regard to such proposal is not likely to lead to the concentration of economic power to the common detriment or is not likely to be prejudicial to public interest in any other manner, Thereupon, the Central Government may, if it is satisfied that it is expedient in the public interest so to do, by order accord approval to the proposal. The Central Government has the direction to refer the proposal of the applicant to the MRTP Commission for an inquiry if the former is of the opinion that the approval can be given only after further inquiry by the latter. Upon receipt of the report of the Commission, the Central Government may pass such order with regard to the proposal for the establishment of a new undertaking, unit or division as it may think fit. The findings of the Commission in its report are mere recommendatory in nature and as such not binding on the Central Government. No scheme of finance on the strength of which the establishment of a new undertaking, unit or division has been approved by the Central Government can be modified except with the previous approval of that Government.

Section 21 and 22 not to apply to certain cases : The Central Government is empowered by Section 22A to direct, by notification, that subject to such terms and conditions as may be specified in the notification all or any of the provisions of Section 21 or Section 22 shall not apply to any proposal : (a) in respect of an industry or service specified in the notification : provided that no industry or service shall be so specified unless the Central Government is satisfied having regard to all relevant factors that it is of high national priority ; (b) for the increase in the production of goods or the provision of any services which are meant exclusively for export outside India ; or (c) which relates to an undertaking established or proposed to be established in *free trade zone* (i.e. Kandla Free Trade Zone and Santacruz Electronics Export Processing Zone and includes any other trade zone which the Central Government may, by notification in the Official Gazette, specify—vide Explanation (i) to Section 10A of the Income-tax Act, 1961).

Every notification issued as aforesaid shall remain effective for such period not exceeding 5 years at a time as may be specified in the notification [sub-section (2)]. Every notification issued shall be laid as soon as may be, after its issue, before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Merger, amalgamation and take-over ; Section 23 (as modified by the

1984 Amendment Act) provides that *notwithstanding anything contained elsewhere in this Act or in any other law for the time being*, (a) a scheme of merger or amalgamation of an undertaking (to which Part A of Chapter III applies) with any other undertaking, (ii) a scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to which Section 20(a) or 20(b) would apply, shall not be sanctioned by any Court or be recognised for any purpose or be given effect to unless the scheme has been approved by the Central Government under this Section. The significance of the non-obstante clause italicised above is to give overriding effect to the provisions of sub-section (1) dealt with above.

If the owner of an undertaking to which this Part applies frames a scheme of merger or amalgamation thereof with *any other undertaking to which Part A of Chapter III applies*, then he must apply to the Central Government in the prescribed form (i.e. Form III of the MRTP Rules) with a copy of the scheme annexed thereto for the approval of the Scheme. Before that, he cannot give effect to such Scheme. Similarly, if any scheme of merger or amalgamation is proposed between two or more uudertakings, and, if as a result of such merger or amalgamation, an undertaking would come into existence to which Section 20(a) or Section 20(b) would apply, then the owner [referred to in Section 20(a)], or as the case may be, the framers of the Scheme [referred to in Section 20(b)] must apply to the Central Government in the prescribed form (i.e. Form III of the MRTP Rules) with a copy of the Scheme annexed thereto for approval of the Central Government. But before that he/they cannot give effect to such scheme [sub-section (2)].

Normally, the provisions of sub-section (1) or sub-section (2) shall not apply to a scheme of merger or amalgamation of inter-connected undertakings which produce the same goods or provide the same services, and none of which is a dominant undertaking; i.e. the approval of the Central Government will not be necessary. But if as a result of such merger or amalgamation there comes into existence any undertaking to which Section 20 (a) or Section 20 (b) would apply, then the provisions of sub-section (1) or sub-section (2) shall apply [sub-section (3)] ; that is, the approval of the Central Government would be necessary.

Take-over of undertakings : Section 23(4) deals with take-over of undertakings. A method by which a company acquires shares of another company to obtain control of the latter is popularly known as "take-over bid". In this case, the direct or indirect control over the assets of the acquired company vests in the acquirer; but in the case of an amalgamation, the shareholdings in the combined enterprise will be spread among the shareholders of the two companies.

It may so happen that the owner of an undertaking (to which Part A of Chapter III applies) proposes to take over the whole or part of any other undertaking. In such a case, the owner cannot give effect to the proposal without first applying in writing to the Central Government for its approval thereon. This application has to be made in the prescribed form (i.e. Form IV of the MRTP Rules) specifying therein information regarding the interconnection of such undertaking with any other undertaking (s), the scheme of

finance with regard to the proposed take-over and such other information as may be prescribed [sub-section (4)]. Normally, the provisions of this sub-section will not apply (i.e. there would be no necessity for applying for the Central Government's approval as aforesaid) to the take-over by the owner of an undertaking, which is not a dominant undertaking, of any other undertaking which too is not a dominant undertaking, if both the undertakings produce the same goods or provide the same services; but if as a result of such take-over an undertaking would come into existence to which Section 20 (a) or Section 20(b) would apply, then the provision of sub-section (4) of Section 23 shall apply (i.e. the application for Central Government's approval has to be made before giving effect to the proposals of take-over bid) [Proviso to sub-section (4)].

According to sub-section (8), despite anything contained in any other law for the time being in force, any proposal to acquire by purchase, take-over or otherwise of an undertaking to which Part A of Chapter III applies shall not be given effect to unless the Central Government has made an order according its approval to the proposal. Under sub-section (5), no proposal mentioned in sub-section (4), which has been approved by the Central Government under sub-section (8) and no scheme of finance with regard to such proposal can be modified without the previous approval of the Central Government.

By virtue of sub-section (6), on the receipt of an application for merger or amalgamation or for take-over, the Central Government may, if it thinks fit, ask the applicant to satisfy it about the following, namely—(a) that the proposed scheme of merger or take-over and the scheme of finance relating thereto are not likely to lead to concentration of economic power to the common detriment, or (b) that they are not likely to be prejudicial to the public interest in any manner; and (c) that it is expedient in the public interest to do so. If the Central Government is satisfied, after giving the applicant a reasonable opportunity of being heard, that it is necessary to do so, it may by order accord its approval to the proposal for such merger or amalgamation or, as the case may be, such take-over. This order of approval, the Central Government may pass on its own volition. However, if the Central Government is of the opinion that the said approval cannot be granted without further inquiry, it can refer the application to the MRTP Commission for the purpose. On the receipt of the Commission's report, the Central Government may pass such orders as it may think fit.

With a view to removing any doubt as to the extent of the share capital of the transferee company which must be acquired in order that such acquisition may amount to take-over, an Explanation has been added newly by the 1984 Amendment Act. Accordingly, in relation to an undertaking owned by a body corporate, "take-over" means the acquisition of 25% or more of the voting power in relation to such body corporate. In relation to any other undertaking, "take-over includes the acquisition or control of management thereof, whether by the acquisition of the ownership of the undertaking or under any mortgage, lease or license or under any agreement or other arrangement.

Effect of Contravention of Section 23 : In terms of Section 24, where any merger, amalgamation or take-over is being or has been effected in contravention of the provisions of Section 23, the Central Government (after such consultation

with the Commission as it may consider necessary) may direct, without prejudice to any penalty leviable under this Act for such contravention, the owner of the undertaking concerned to cease and desist from such contravention, to divest himself of the stock or other share capital or assets so acquired and to carry out such further directions as the Central Government may, in all the circumstances of the case, issue.

Appointment of Director: The control or influence on the undertakings may be not merely through investments but may also be achieved through appointment of directors. Therefore, in the matter of appointment of directors, Section 25 purports to impose restrictions on interlocking of directorship. In spite of anything to the contrary contained in any other law for the time being in force, a person who is a director of an undertaking (to which Part A of Chapter III applies) cannot be appointed as a director of any other undertaking except with the prior approval of the Central Government. Any appointment contrary to the provisions of Section 25 shall be rendered void. However, the Central Government's approval shall not be necessary to the appointment of a person as a director of an undertaking unless he holds such office in more than 10 inter-connected undertakings. In other words, no prior approval of the Central Government will be necessary as long as he, even after his last appointment, remains director in 10 companies as aforesaid [sub-section (1) with the Proviso thereto].

Here the undertakings of which directorships are being considered are those which fall within the same group of inter-connected undertakings. It is not intended to prevent a director who holds directorship in one group of inter-connected undertakings from becoming a director of another set of inter-connected undertakings provided in neither of the set the number of inter-connecteds is 10 or more. Of course, Section 25 has to be read in addition to and not in derogation of Sections 275 to 279 of the Companies Act which too impose restrictions on number of directorships, *i.e.*, directorship in more than 20 companies at one and the same time.

Even if his appointment becomes void in the circumstance contemplated by sub-section (1), his act already done in this capacity shall not be invalid merely on that account. But any act done by such Director after his appointment has been shown to the undertaking as well as to him to be void, shall not be valid [sub-section (2) and the Proviso thereto].

According to sub-section (4), the restrictions contained in Section 25 on the appointment of directors shall apply to partners of any firm or the members of the managing or executive committee (by whatever name called) of any other association of individuals, whether incorporated or not owning an undertaking within the meaning of this Act, as they apply to directors of companies.

The contravention of Section 25 will entail as per Section 47 fine extending to Rs. 2,000/- and a further fine extending to Rs. 200/- per day if the offence is a continuing one.

Part B of Chapter III

Under this Chapter come three Sections namely Sections 27, 27A and 27B.

The last two sections have been incorporated newly by the MRTP (Amendment) Act, 1984. Prior to this Amendment Act, the Central Government had the power under Section 27 only to order division of undertakings. By the enactment of Sections 27A and 27B, the Central Government has assumed powers to order severance of inter-connection between two or more undertakings as well as to acquire undertakings after the order of severance or division and to pay compensation. These Sections are dwelt upon hereunder.

Division of Undertaking: Section 27 which comprises this topic is intended to break the concentration of economic power where the working of an undertaking covered under Chapter III is discovered to be prejudicial to public interest. That the provisions of this Section override other laws is evident from the opening phrase "notwithstanding anything contained in this Act or in any other law for the time being in force". The Central Government may form an opinion that the working of an undertaking to which Part A of this Chapter applies: (i) is prejudicial to the public interest or (ii) has lead or is leading or is likely to lead to the adoption of any monopolistic or restrictive trade practices. If it comes to hold any such opinion, then it may refer the matter to the MRTP Commission for an inquiry as to whether it is expedient in the public interest to make an order: (a) for the division of any trade of the undertaking by the sale of any part of the undertaking or assets thereof; or (b) for the division of any undertaking or inter-connected undertakings into such number of undertakings as the circumstances of the case may justify. Thereupon, the Commission may, after such hearing as it thinks fit, report to the Central Government about its opinion thereon. If the Commission is of the opinion that a division ought to be made, then it must specify the manner of the division and compensation, if any, payable for such division [sub-section (1)].

It may be noted that all activities carried on by way of trade by an undertaking or two or more inter-connected undertakings may be treated as a single trade [Explanation].

If the Commission specifies the manner of the division and compensation therefor as aforesaid, then the Central Government may by an order in writing direct the division of any trade of the undertaking or of the undertaking of inter-connected undertakings [sub-section (2)]. Under sub-section (3), this order of the Central Government may provide for all such matters as may be necessary to give effect to the division of any trade of the undertaking or of the undertaking or inter-connected undertakings, including—

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by the discharge or reduction of any liability or obligation, or otherwise;

(c) the creation of allotment, surrender or cancellation of any shares, stock or securities:

(d) the payment of compensation;

(e) the formation or winding up of an undertaking or the amendment of the memorandum and articles of association or any other instruments regulating the business of any undertaking;

(f) the extent to which and the circumstances in which provisions of the order affecting an undertaking may be altered by the undertaking and registration thereof;

(g) the continuation, with such changes as may be necessary, of parties to any legal proceeding.

Under sub-section (4), the Central Government is empowered to take certain steps by way of interim measure to prohibit or restrict the doing of anything that might impede the operation or making of the order as well as to impose on any person such obligation as to the carrying on of any activities or the safeguarding of any assets, as it may think fit. The Central Government may also by order provide for the carrying on of any activities or safeguarding of any assets either by the appointment of a person to conduct, or supervise the conduct of, any such activities or in any other manner.

According to sub section (5), in spite of anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an undertaking or inter-connected undertakings is not entitled to claim any compensation for such cessor.

The contravention of the aforesaid provisions of Section 25 will attract punishment with imprisonment for a term extending to 5 years or with fine extending to Rs. 1 lakh or with both, and with a further fine of Rs. 1000/- per day for a continued contravention [Section 46 as amended by the 1984 Amendment Act].

Central Government's power to direct severance of interconnection between undertakings: Section 27A also overrides the provisions contained elsewhere in this Act or in any other law for the time being in force. The Central Government may come to form an opinion that the continuance of iterconnection of an undertaking (hereinafter in this Section referred to as "the principal undertaking") with any other undertaking (to which Part A of Chapter III applies) is detrimental to: (a) the interest of the principal undertaking; or (b) the future development of the principal undertaking; or (c) the steady growth of the industry; or (d) the public interest. If it is of such an opinion, it may refer the matter to the MRTP Commission for an inquiry. The inquiry is to relate to whether it is expedient in the public interest to order for the severance of such inter-connection on any one or more of the aforesaid four grounds. Thereupon, the Commission, after such hearing as it thinks fit, report to the Central Government about its opinion But if the Commission's opinion is in favour of the severance of the inter-connection of the principal undertaking, then its report must include a SCHEME regarding the severance. In the scheme, the Commission has to provide for the following matters, namely—

(a) the manner in which, and the period within which, the severance of such inter-connection is to be effected;

(b) the appropriation or transfer of any share or other interest held by the owner in, or in relation to, the principal undertaking, in the other undertaking or the termination of any office or employment in such

undertaking, which may be required for effecting the severance of such inter-connection ;

(c) compensation, if any, payable for the severance of such inter-connection ; and

(d) such incidental, consequential and supplemental matters as may be necessary to secure the severance.

On the basis of the aforesaid recommendation of the Commission, the Central Government may by a written order direct the severance of inter-connection between the undertakings [sub-section (3)].

Under sub-section (4), the Central Government is empowered to take certain steps as an interim measure to prohibit or restrict the doing of anything that might impede the operation or making of the order and also to impose upon any person such obligations as to the carrying on of any activities or the safeguarding of any assets, as it may think fit. The Central Government may also by order provide for the carrying on of any appointment of a person to conduct, or supervise the conduct of any such activities or in any other manner.

According to sub-section (5), in spite of anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office in consequence of the severance of inter-connection between undertakings is not entitled to claim any compensation for such cessor.

"Inter-connection" referred to in Section 27A means inter-connection of an undertaking with any other undertaking in any manner specified in Section 2(g) [Explanation].

Manner of carrying out order of division or of severance : It may be noted that the Commission in its report recommends for division of undertakings (Section 27) or severance of inter-connection between two or more undertakings (Section 27A) and states that it should be effected either by the disinvestment by person holding any share in the body corporate owning such undertaking(s) or by the sale of the whole or any part of such a case, the Central Government, as per Section 27B, may (under Section 27 or Section 27A) specify that such disinvestment of shares or the sale of the whole or part of the undertaking(s) or of such assets, as the case may be, shall be effected within the period specified in the order. The Central Government may also specify in its order that the above-mentioned disinvestment or sale shall be effected in one or more of the following namely—

(i) by directing the person holding such shares to making a public offer for the sale of such number of shares held by him in the body corporate owning the undertaking(s), as may be specified in the order ; or

(ii) by directing the body corporate owning the undertaking to make further issue of equity capital to the members of the public except to the person who is directed to disinvest the shares held by him in such body corporate ; or

(iii) by directing that the sale of the undertaking or any part thereof, or, as the case may be, of assets, be made by public auction ; or

(iv) by such other prescribed method as the Central Government may specify. [Sub-section (1)].

The time-limit specified in the Central Government's order (as aforesaid) can, however, be extended by it either on its own motion or on an application of the person concerned provided there is a sufficient cause for such extension [Proviso to sub-section (1)].

The above-mentioned order of the Central Government shall be effective irrespective of whether anything is contained elsewhere in this Act or in any other law for the time being in force or in the memorandum or articles of association of the body corporate owning the undertaking [sub-section (2)]. Thus, this provision overrides everything else.

In the case of any ommision or failure to disinvest any share or block of shares specified in the Central Government's aforementioned order, the body corporate in which such shares are held must not permit the defaulter or his nominee or proxy to exercise any voting or other rights attaching to such share or block of shares [sub-section (3)].

Part C of Chapter III

Part C contains three Sections, viz., Sections 28, 29 and 30. It may be recalled, for refreshing the memory, that both the Central Government and the MRTP Commission have their respective parts to play in regard to the matters comprised in Part A or Part B of Chapter III. A probe into the provisions contained in Part A would make it explicit that the Central Government is vested with authority to pass final order and that the Commission has only a recommendatory or advisory role. That is to say that the Central Government, on the receipt of the Commission's report, may take such action as it thinks fit. In other words, the findings of the Commission are not obligatory for the Central Government. The provisions contained in Part B reveal that the MRTP Commission findings that a division of the undertakings (Section 27) or severance of inter-connection between undertakings (Section 27A) has to be made. In this context, it may be interesting to note that if the Commission does not recommend division or severance, the Central Government will be bereft of any power to order a division of undertakings or the severance of undertakings.

In view of the different roles of the Central Government and the MRTP Commission, it would be apt to know what factors they should bear in mind in the exercise of their respective jurisdiction. *Section 28* is exactly intended to subserve this purpose. It provides that the Central Government or, as the case may be, the Commission is required to take into account all matters which appear in the particular circumstances to be relevant. While doing so, amongst other things, regard shall be had to the need consistently with the general economic position of the country—

(a) to achieve the production, supply and distribution, by most efficient and economical means, of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of the defence of India and home and overseas markets ;

(b) to have the trade organised in such a way that its efficiency is progressively increased ;

(c) to ensure the best use and distribution of man, materials and industrial capacity in India ;

(d) to effect technical and technological improvements in trade and expansion of existing markets and the opening of new markets ;

(e) to encourage new enterprises as a countervailing force to the concentration of economic power to the common detriment ;

(f) to regulate the control of the material resources of the community to subserve the common good ; and

(g) to reduce disparities in development between different regions and especially in relation to areas which have remained markedly backward.

It will have been seen that Section 28 enjoins upon the Government and the Commission to bear in mind certain criteria in approving or rejecting a proposal involving a question of concentration. The proposals are scrutinised in the light of the current Industrial Licensing Policy and other socio-economic policy of the Government and the criteria laid down in Section 28. The criteria mentioned in Section 28 are not the only criteria, because the Section requires that "among other things, regard shall be had to" those criteria. Further, those criteria have been clarified by the general economic position of the country to which the Section refers. The criteria are required to be applied consistently with the general economic position Besides, the Central Government or the Commission, while applying the criteria, has also to see whether they are relevant in the particular circumstances of the case. Also, the criteria mentioned in Section 28 are not justiciable. The fact that these criteria have to be kept in view does not detract from the consideration of public detriment to which Sections 21, 22 or 27 or 27A refers. Inasmuch as Section 23 does not make a mention of public interest or public detriment, non-application of the mind on the criteria laid down in Section 28 may vitiate an order under Section 23.

Under *Section 29*, the Central Government, before making an order under Chapter III, ought to give a reasonable opportunity of being heard to any person who is, or may be, in its opinion, interested in the matter under the consideration of that Government.

In the matter of granting approvals to expansion, establishment of new undertakings, amalgamation, merger or take-over, the Central Government is invested with necessary power to lay down certain conditions which the applicant is required to comply with. Normally, these conditions reflect the Government-policy regarding the promoters' contribution, public participation in the share capital of companies, dilution of non-resident holdings, securing of the interests of the small-scale sector and the like. It is usual to impose one or more of the following conditions while granting such approvals :

(a) Dilution in non-resident holdings in the equity capital of Indian companies, commensurate with the approved policy of the Government.

(b) Large public participation in the share capital and meting out of preferential treatment in the allotment of equity capital to the public financial institutions and the general public in order to ensure dilution of group holdings ;

(c) Keeping up of suitable equity-debt and net block-debt ratios in accordance with the nature of the project and the policy of the Government;

(d) Representation of public financial institutions and nationalised banks on the Board of Directors of the Company ;

(e) Availability of the right to the public financial institutions for insertion of convertibility clause enabling them to convert the institutional loans into equity at their option ;

(f) Stipulation for the conversion of the existing private companies into public companies and enlistment of their shares on recognised stock exchanges and formation of a new body corporate in suitable cases with a condition for enlistment of its shares on recognised stock exchanges ;

(g) Stipulation of a condition regarding professionalisation of management ;

(h) Stipulation in regard to purchase of requirements of ancillaries and small-scale sectors ;

(i) Reservation of certain percentage of raw materials and basic drugs for non-associated formulators ;

(j) Stipulation of export obligation as may be found feasible and desirable ;

(k) Cost of project to be made out of internal resources ;

(l) Steps to be taken to prevent air, soil and water polution ;

(m) Entire production from the proposal project to the exported stipulating a certain percentage of value added ;

(n) Stipulation that the product shall conform to the standards prescribed by the I.S.I. from time to time and that the I.S.I. certificate be obtained;

(o) Stipulation that the project be set up in a "non-industry district."

Grounds for Rejection of Proposals : Substantial expansion or setting up of new undertakings : Such proposal may be rejected if these are regarded as *inexpedient in the public interest.* Usually, rejection takes place on one or more of the following grounds :

(i) Applicant's unwillingness or inability to accept a specified export obligation.

(ii) Direct or indirect adverse effects on the interests of the existing manufacturers particularly in the small-scale and medium-scale and the public sectors.

(iii) Existence of adequate capacities already created in the country and lack of scope for creation of additional capacity.

(iv) Foreign majority companies' unwillingness or incapacity to accept condition in respect of dilution of foreign holdings in accordance with the approved policy of the Government.

(v) Absence of appreciable demand for the product in question and hence no scope for further licensing under the Industries (Development and Regulation) Act.

(vi) Product being disallowed to be manufactured by the large Industrial Homes under the relevant licensing policy.

(vii) Applicant's failure to submit the phased manufacturing programme to the satisfaction of the Government.

(viii) Proposed location being at variance with the Government's locational policy.

(ix) Proposal being at variance with any specified policy enunciated by the Government, e.g., Drug Policy.

Time-limit within which action should be taken : It is statutorily necessary to dispose of application submitted under Sections 21, 22 or 23 within a specified time. Accordingly, Section 30 provides that if the Central Government is of the opinion that approval cannot be given for the proposal of substantial expansion or establishment of new undertakings or for merger, amalgamation and take-over without a further inquiry into the matter by MRTP Commission, then the Central Government should refer the matter to the Commission for the purpose within 60 days from the date of receipt of the application. But if the Central Government calls for further particulars in connection with any such notice, application or proposal, then the aforesaid period of 60 days shall be counted from the date of the receipt of such further particulars [sub-section (1) with the Proviso thereto].

Similarly, though the Commission is required to make a report to the Central Government within 90 days from the date of the receipt of the reference, this period again is subject to extension to the extent the Commission puts down the reasons for the delay in its report [sub-section (2)]. It is only when the report has been received from the Commission that the application or the notice has to be disposed of within 60 days from the date of receipt of the report from the Commission [sub-section (3)].

Although sub-section (4) stipulates that every application or notice which *is not referred by the Central Government to the Commission* must be disposed of within 90 days, nevertheless this period is extendable so long as the Central Government records in writing special reasons for the delay.

Procedure followed by the MRTP Commission in respect of References under Sections 21, 22, 23 : It is important to know the procedure followed by the Commission in respect of references made to it under Sections 21, 22, 23, 27, 27A and 31 of the Act. Chapter V—Regulation 36—of the MRTP Regulations, 1974 contain provisions in this regard. These are briefly given hereunder :

(i) where a reference is under the aforesaid sections of the Act, the Commission may publish short particulars concerning the references by way of a notification in such daily newspapers and periodicals as it may consider appropriate, inviting comments regarding the proposal within such time as may be mentioned in the notification ;

(ii) the comments shall be sent in quadruplicate and the person sending the comments shall state whether he would like to participate in the public hearing concerning the notified proposal before the Commission ;

(iii) In case of references under Section 27 or Section 27A of the Act, the Commission shall, after such investment as it deems fit, formulate its tentative opinion. It shall thereafter furnish to the owner of undertaking(s) concerned a copy of the reference and its tentative opinion. The owner of underking(s) concerned may, within such time as the Commission may fix in each case, file a statement of its objections and/or suggestions to or in respect of the tentative opinion.

(iv) In case of references under Section 31, the Commission shall furnish to the owner of undertaking(s) concerned the substance of the reference and permit such owner of undertaking(s) to submit its/their written statements with regard to the subject-matter of the reference, in quadruplicate within 14 days of the receipt of the notice.

(v) the Commission may address letters to the applicant, concerned Government Departments and such other parties, calling for relevant particulars and information. The replies to such letters to the Commission shall be furnished in quadruplicate ;

(vi) the Commission may call the applicant concerned or concerned owner of undertaking(s), any Government official and any other person for such discussion as it may consider necessary for the inquiry ;

(vii) the Commission may also visit such establishments including that of the applicant or concerned owner of undertaking(s) and hold discussions with their representatives, if the Commission feels that such visits and discussions may be useful for the inquiry ;

(viii) the Commission may also depute such of its officers and staff to such places and to meet such persons as it may deem appropriate, for inquiries and discussions relevant to the reference and take into consideration the reports of such officers ;

(ix) the applicant, the concerned undertakings, the persons who have sent their comments and expressed their desire to participate in the hearing, and such other persons as the Commission may determine shall be intimated about the date of public hearing not later than 21 days before the date fixed for hearing. The persons who have sent their comments and have intimated that they would like to participate in the public hearing, shall file with the Commission not less than 10 days before the date of public hearing, a statement containing the submissions that they wish to make at the public hearing ;

(x) the Commission shall hear the persons to whom the intimation of public hearing is sent. The Commission may examine witnesses including experts in any field ; and

(xi) the Central Government shall be entitled to be represented by such officer as it may depute. The parties concerned may be either heard by them to act on their behalf.

CHAPTER III-A of the MRTP ACT

This is a new Chapter added by the MRTP (Amendment) Act, 1984. It contains 7 Sections (viz., 30A to 30G) which deal with restrictions on the Acquisition and Transfer of Shares of, or by, certain bodies corporate.

The provisions of this Chapter shall apply to certain individuals, firms, groups, et el, in the matter of (a) acquisition of shares, or share capital; and (b) transfer of shares or share capital by or to the aforesaid entities in certain circumstances. Thus, firstly the provisions of this Chapter shall be applicable to the acquisition of shares or share capital by an individual, firm, group, constituent of a group, body corporate, or bodies corporate under the same management, who/which—(i) is the owner in relation to an undertaking to which Part A of Chapter III applies, or (ii) would be, as a result of such acquisition the owner of an undertaking to which Part A of Chapter III applies, or would apply. Secondly, the provisions of Chapter IIIA shall apply to the transfer of shares or share capital, or to, any of the entities mentioned above, who/which—(i) is the owner in relation to an undertaking to which Part A of Chapter III applies, or (ii) would be, as a result of such transfer, the owner of an undertaking to which Part A of Chapter III applies, or would apply [Section 30A].

Under the provisions as enacted by the 1984 Amendment Act, any company to which Part A of Chapter III of the Act applies, will be required to obtain approval of the Central Government for acquisition and transfer of shares of MRTP as well as non-MRTP companies.

Restrictions on acquisition of certain shares : Section 30B imposes certain restrictions in this behalf on any individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management. Any of such entities cannot jointly or severally acquire or agree to acquire (whether, in his or its name or in the name of any other person) any equity shares in a public company or its private subsidiary without the previous approval of the Central Government; this previous approval would be necessary, if and only if the total nominal value of the equity shares intended to be so acquired exceed or would, together with the total nominal value of any equity shares already held in the company by any such entities as aforesaid, exceed 25% of the paid-up equity share capital of such company [sub-section (1)].

If any acquirer (i.e individual, firm, group, etc.) is prohibited by sub-section (1), from acquiring or agreeing to acquire, except with the previous approval of the Central Government, any share of a public company or its private subsidiary, no company in which Central Government's shareholding is at least 51% of the share capital or no corporation (not being a company) established by or under the Central Act or no financial institution can transfer or agree to transfer any share to such acquirer, unless such acquirer has obtained the previous approval of the Central Government for the acquisition, or agreement for the acquisition, of such share [sub-section (2)].

Restriction on transfer of shares : Under Section 30C, if a body corporate, or bodies corporate under the same management holding either singly or in the

aggregate 10% or more of the nominal value of the subscribed equity share capital of any other company desire to transfer one or more of such shares, then it/they before transferring the same must give to the Central Government an intimation to this effect. Every such intimation must include: (i) a statement as to the particulars of the share proposed to be transferred; (ii) the name and address of the proposed transferee; (iii) the share-holding, if any, of the proposed transferee in the concerned company; and (iv) any other particulars as may be prescribed [subsection (1)]. If the Central Government, either on the receipt of the intimation under sub-section (1) or *otherwise*, is satisfied that as a result of such transfer, a change in the composition of the Board of Directors of the company is likely to take place and that such change would not be prejudicial to the interests of the company or to the public interest, then it can by order do either of the following things:

(a) It may direct that no such share capital shall be transferred to the proposed transferee. However, no such order shall preclude the body corporate or the bodies corporate from intimating, in accordance with the provisions of sub-section (1), to the Central Government its or their proposal to transfer the share to any other person.

(b) It may direct that where such share is held in a company engaged in any industry specified in Schedule XIII to the Companies Act, such share shall be transferred to the Central Government or to such corporation controlled by that Government as may be specified in the direction. The scheduled industries are: 1. Aircraft. 2. Air transport, 3. Arms and ammunition and allied items of defence equipment, 4. Atomic energy. 5. Coal and lignite. 6. Heavy castings and forgings of iron and steel. 7. Heavy electrical plant including large hydraulic and steam turbines. 8. Heavy plant and machinery required for iron and steel production for mining, for machine tool manufacture and for such other basic industries as may be specified by the Central Government. 9. Iron and steel. 10. Mineral oils. 11. Minerals specified in the Schedule to the Atomic Energy (Control of Production and Use) Order, 1953. 12. Mining of iron ore, manganese ore, chrome ore, gypsum, sulphur, gold and diamond. 13. Mining and processing of copper, lead, zinc, tin, molybdenum and wolfarm. 14. Railway transport. 15. Shipbuilding. 16. Telephone, and telephone cables, telegraph and wireless apparatus (excluding radio receiving sets). [Part I of Schedule XIII to the Companies Act]; 17. Aluminium and other non-ferrous metals not included in Part 1. 18. All other minerals except "minor minerals" as defined in Rule 3 of the Minerals Concession Rules, 1949. 19. Antibiotics and other essential drugs. 20. Basic and intermediate products required by chemical industries such as the manufacture of drugs, dye-staffs and plastics. 21. Carbonisation of coal. 22. Chemical pulp. 23. Ferro alloys and tool steels. 24. Fertilizers. 25. Machine tools. 26. Road transport. 27. Sea transport. 28. Synthetic rubber [sub-section (2)].

Where a direction for transfer of shares held in a company engaged in any industry mentioned above has been made, the share referred to in a direction stands transferred to the Central Government or, as the case may be,

to the corporation; and it shall pay in cash to the body corporate or bodies corporate from which such share stands transferred. The amount of such cash payments shall be equal to the *market value* of such share. In the case of a share quoted on any recognised stock exchange, "market value" means the value quoted thereat on the date immediately preceding the date on which the direction is made. In any other case, "market value" means such value as may be mutually agreed upon between the shareholder and the Central Government or the specified corporation, or in the absence of any such mutual agreement, as may be determined by the Court [sub-section (3) and the Explanation thereto]. The aforesaid cash payment on the market value has to be made *forthwith* if there is no dispute as to such value or if such value has been mutually agreed upon. If there is a dispute as to the market value, then such value as is estimated by the Central Government or, as the case may be, the corporation shall be given forthwith and the balance, if any, shall be given within 30 days from the date when the market value is determined by the Court [sub-section (4)].

If the Central Government does not issue any direction under sub-section (2) within 60 days from the date of receipt by it of the intimation given under sub-section (1), then the provisions contained in sub-section (2) with regard to the transfer of such share shall not apply [sub-section (5)].

Restriction on the transfer of shares of foreign companies: Section 30D imposes certain restrictions on body corporate or on bodies corporate under the same management in the matter of transfer of shares of foreign companies. If it holds, or they hold in the aggregate, 10% or more of the nominal value of the equity share capital of a foreign company which has an established place of business in India, then it/they shall not transfer any share to any Indian citizen or Indian company without the previous approval of the Central Government. And the Central Government will not refuse this previous approval unless it is of the opinion that such transfer would be prejudicial to the public interest.

Power of the Central Government to direct companies not to give effect to transfer: Section 30E empowers the Central Government to direct a company not to give effect to the transfer of any of its share or block of shares. But before doing so, it must be satisfied about the existence of the following circumstances:

(a) that as a result of the tranfer a change in the controlling interest of the company is likely to take place; and

(b) that such change would be prejudicial to the interests of the company.

On being satisfied of the existence of the aforesaid two circumstances, the Central Government may also, in addition to the above-mentioned direction not to give effect to the transfer, direct; (i) not to permit the transferee or any nominee or proxy of the transferee to exercise any voting or other rights attaching to such share or block of shares, where the transfer thereof has already been registered; and (ii) not to permit any nominee or proxy of the transferor to exercise any voting or other rights, where the transfer has not been registered [sub section (1)]. On any such direction having been made by the Central Government, the share or the block of shares shall stand transferred to the person from whom it was acquired; thereupon, the amount paid by the transferee for the acquisition of the same shall

have to be refunded to him by the person to whom such share or block of shares stands transferred [sub-section (2)]. If the refund is not made to the transferee within 30 days from the date of the direction of the Central Government then it shall, on the application of the transferee, direct by order the refund of the amount; such order of the Central Government may be enforced as if it were a decree made by Civil Court [sub-section (3)]. After making the refund in the either of the circumstance mentioned above, the person to whom the share or block of shares stands transferred shall be eligible to exercise voting or other rights attaching thereto [sub-section (4)].

Time limit for communication of refusal : Under Section 30F, the Central Government is to refuse to grant its approval to the proposal for the acquisition of any share (mentioned in Section 30B) or transfer of any share (referred to in Section 30D) it shall do so within 60 days from the date of the receipt of the request for approval. If it does not do so within this period, then the approval will be presumed to have been granted.

Government companies excepted from the purview of Sections 30B to 30E : Nothing in Section 30B [except sub-section (2) thereof] shall apply to the transfer of any share to the following :

(a) any company in which Central Government's shareholding is 51% or more of the share capital ;

(b) any corporation (not being a company) established by order under any Central Act ;

(c) any financial institutions.

Also, nothing in Section 30C or Section 30D or Section 30E shall apply to the transfer of any share by the above-mentioned three entities (Section 30G).

CHAPTER IV OF THE MRTP ACT (as amended by the 1984 Amendment Act.

This Chapter of the Act deals with monopolistic trade practices. One of the objects of the Act is to curb such trade practices. Although the Act does not define the term "monopoly" nevertheless it is a matter of common knowledge that both pure monopoly or monopolistic position not only engenders concerted action to fix prices, supplies or commodities, et el but also thwarts competition in the market. This aspect was thoroughly analysed by the Monopoly Inquiry Commission. The relevant passages from Chapter V of its Report are quoted hereunder :

"Our study of product-wise concentration brings out prominently the fact that in a large number of industries, a single undertaking is the only supplier or at least has to its credit a very large portion of the market as compared with its competitors. Such an undertaking has the power to dictate the price of the commodity or services it supplies and to regulate its volume of production in such a manner as to maximize its profits. This power is what is generally understood by the words "monopoly power". Though in the strict etymological sense of the word, and in strict economic theory, "monopoly" exists when there is only one single supplier, there is no reason why an enterprise enjoying the power to dictate the price and thus to control the market even though it is not the

single supplier should not be considered a monopoly. What happens in such cases is that the price decided upon by the dominant producer (or distributor) is followed by others who are in a position to compete. This price leadership phenomenon is in essence a manifestation of the price leader's power to dictate the price in the market. We think it proper therefore to include within the word "monopoly" not only the single supplier in a market but also the one dominant supplier who has the power to dictate the price in the market.

The question that next arises is: When such a power is shared by a few enterprises being the dominant sellers, should they be considered to be holding a monopolistic position? We see no reason to exclude such dominant sellers from our understanding of monopoly. For, the essence of monopoly is the ability to dictate the price and control the market without being materially influenced by other competing concerns.

One important difference between the situation when a single seller dominates the market and a few independent sellers together enjoy a dominating position cannot be overlooked. In the former case, monopoly power is inevitably present: in the latter it may or may not be present. The effect on the market of a few dominant sellers has been widely discussed by economists, specially in recent years; but their opinions are by no means the same. We do not propose to try to resolve this controversy. It is sufficient for our purpose to notice that it is generally agreed that when a few big sellers dominate the market there will ordinarily be a high probability of their coming to some kind of agreement or understanding whether formal or not, about the price and output, by which a monopolistic power is shared between themselves. Even in the absence of such agreement or understanding it frequently happens that each has a healthy fear of the other big producers or distributors and ultimntely a policy of live and let live comes into operation. Some economists point out that when a few large sellers dominate the market each of them is able to calculate fairly and accurately the probable effect on the market of his action in increasing or decreasing his output. So, it is said that each will try to regulate the output in such a way that the marginal costs remain well below the price. Each such seller will also be well aware that any attempt of his to reduce the price is likely to be met immediately by similar action by his competitors. The matter is succinctly put by Stocking in Monopoly and Free Enterprise thus:

"In markets where sellers are few, each in trying to determine his most profitable volume of output must, as would a monopolist, consider the probable effects of various possible rates of production not only on costs but also on prices. Indeed each seller will ordinarily decide on the price at which he will sell and adjust his output accordingly, just as a monopolist does. Each oligopolist however in determining his price must consider not merely his own cost-price relationships but also how his rivals will react to his prices. Anyone of a few sellers, if fully informed and perfectly rational, when selling a completely standardised product will realise that if he reduces his price his rivals will meet the lower price promptly."

For all these reasons we are convinced that when the market is dominated by a few sellers, monopolistic conditions will sometimes prevail. At the same

time, we are conscious that even in a market of a few sellers there will sometimes be keen competition. This is likely to happen—apart from the effect of the mutual jealousies which sometimes characterise the relations between big business houses when one or more of the few sellers feel confident that due to superior managerial ability and technical skill and financial resources they will be able to capture a larger share of the market at the expense of their rivals. Even so, there is no gainsaying the fact that in a market of a few dominating sellers there is a real risk of the emergence of monopolistic power and consequently of monopolistic practices. To ascertain the extent to which monopolistic practices prevail, we must examine not only the cases where a single enterprise is the sole or dominant producer of the goods or services but also the cases where a few enterprises between themselves share such dominating position".

Students should note that Section (2) (i), (ja) and (u) [respectively defining "monopolistic trade practice", "owner" and "trade practice"] and Chapter IV of the Act are important for understanding the legal provisions pertaining to monopolistic trade practice. They are advised to refer to Study Paper 11 to refresh their memory in respect of the aforementioned definitions.

It may be noticed from the definition of monopolistic trade practice that one of the criteria for determining whether or not a trade practice is a monopolistic one is unreasonableness. In the matter of maintaining the price of the goods or charges for the services by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description or the supply of any services or in any other manner, "reasonableness" is the determining test. Reasonableness is also the guiding factor for the following purposes, namely—(i) for preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services ; (ii) for increasing of cost of production of any goods or charges for the provision or maintenance of any services ; (iii) for increasing the prices at which goods are, or may be, sold or resold or the charges at which the services are, or may be, provided or for increasing the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provision of any service ; (iv) for preventing or lessoning competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices Besides, where there is tendency to limit technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed ; or any service rendered, in India to deteriorate, there is statutory inference of a monopolistic trade practice.

While interpreting the phrase "monopolistic trade practice", it is essential to bear in mind the definition of "trade practice" as contained in Section 2 (u) ; that is, any practice relating to the carrying on of trade and including—(i) anything done by any person which controls or affects the price charged by any trader or class of traders or which controls or affects the method of trading of any trader or any class of traders ; (ii) a single or isolated action of any person in relation to any trade.

Chapter IV of the Act empowers the Central Government to pass final orders on monopolistic trade practices after an inquiry and report by the MRTP Commission. The Chapter is comprised of two sections which deal with this matter.

Investigation by Commission of Monopolistic Trade Practices ; Section 31 as amended by the 1984 Amendment Act provides as follows :

It may appear to the Central Government : (a) that the owners of one or more undertakings are indulging in any practice which is, or may be, a monopolistic trade practice ; or (b) that monopolistic trade practices prevail in respect of goods or services. If it so actually appears to the Central Government, then it may refer the matter to the MRTP Commission for any inquiry. Thereupon, the Commission shall, after such hearing as it thinks fit, report to the Central Government its findings thereon. Even without being moved by the Central Government for any inquiry, the Commission may on its own motion make any inquiry into the matter, if it receives information or comes to know of the prevalence of either of the situations mentioned in (a) and (b) above. [sub-section (1) and the Proviso thereto].

When the Central Government refers the matter to the Commission for the latter's inquiry and the latter makes a finding to the effect that, having regard to the economic conditions prevailing in the country and also to all other matters which appear in particular circumstances to be relevant, the trade practice operates or is likely to operate against the public interest, then the Commission must make a report as to its finding to the Central Government. On the receipt of such report, the Central Govornment may, notwithstanding anything contained in any other law for the time being in force, pass such orders as it may think fit to remedy or prevent any mischiefs which result or may result from such trade practice [sub-section (2)]. As regards the *suo motu* inquiry by the Commission referred to in the Proviso to sub-section (1), if the Commission's report contains the finding confirming in toto its information or knowledge of the prevalence of either of the situations mentioned in the aforesaid Proviso, then the Central Government must satisfy itself : (a) that it is necessary to take steps to remedy or prevent any mischiefs which result or may result from such monopolistic trade practice ; and (b) that such monopolistic trade practice does not fall whithin any of the exceptions, specified in Section 32. If it is so satisfied, it may, despite anything contained elsewhere in this Act or in any other law for the time being in force, make such orders as it may think fit. By such orders, the Central Government may : (i) prohibit the owner of the concerned undertaking or the owners of the concerned undertakings (as the case may be) from continuing to indulge in such monopolistic trade practice ; or (ii) prohibit the owners of any class of undertakings or undertakings generally from continuing to indulge in any monopolistic trade practices in relation to such goods or services ; and also make such other orders as it may think fit to remedy or prevent any mischief which results or may result from the continuation of monopolistic trade practices in relation to the goods and services aforesaid [sub-section (2A)].

Without prejudice to the generality of the powers conferred by sub-section (2), any order made by the Central Government under Section 31 as a whole may also include an order—

(a) regulating the production, storage, supply, distribution or control of any goods by the undertaking or the control or supply of any service by it and fixing the terms of sale (including prices) or supply thereof ;

(b) prohibiting the undertaking from resorting to any act or practice or from pursuing any commercial policy which prevents or lessens, or is likely to prevent or lessen, competition in the production, storage, supply or distribution, of any goods or provisions of service ;

(c) fixing standards for the goods used or produced by the undertakings ;

(d) declaring unlawful, except to such extent and in such circumstances as may be provided by or under the order, the making or carrying out of any such agreement as may be specified or described in the order ;

(e) requiring any party to any such agreement as may be so specified, or described to determine the agreement within such time as may be so specified, either wholly or to such extent as may be so specified ;

(f) regulating the profits which may be derived from the production, storage, supply, distribution or control of goods or from the provision of any service ;

(g) regulating the quality of any goods or the provision of any service so that the standards thereof may not be deteriorated [sub-section (3)].

Whenever the Central Government makes any order under sub-section (2) prohibiting the owner of any undertaking or class of undertakings or undertaking generally from continuing to indulge in any monopolistic trade practice, the owner/owners of any undertaking(s) shall communicate to the Central Government his/their compliance with the order. This communication has to be made within 30 days of the receipt of the order or within such further time as the Central Government, on sufficient cause being shown, allow. Similarly, within 90 days from the date of such order of the Central Government or from the expiry of the further time allowed by it, the Director General has to inform the Central Government whether its order has been complied with. If the Director General has any reason to believe that any such order has been, or is being, contravened, then he must inform the Central Government about the particulars of the owner of such undertaking so that the Central Government may take such action, under the Act, as it thinks fit [sub-section (4)].

Monopolistic trade practice to be deemed to be prejudicial to the public interes except in certain cases : Section 32 as substituted by the 1984 Amendment Act expressly provides that a monopolistic trade practice would be *per se* prejudicial to the public interest except where such practice is permitted by the Central Government in certain cases.

For the purposes of this Act, every monopolistic trade practice shall be deemed to be prejudicial to the public interest except in certain circumstances. In other words, the following are the circumstances in which a monopolistic trade shall not be deemed to be prejudicial to public interest :

(a) where such trade practice is expressly authorised by any enactment for the time being in force ; or

(b) where the Central Government is satisfied that any such trade practice is necessary—(i) to meet the requirements of the defence of India or any part thereof, or for the security of State ; or (ii) to ensure the maintenance of supply of goods and services essential to the community ; or (iii) to give effect to the terms of any agreement to which the Central Government is party.

When the Central Government, in either of the circumstances mentioned above, permits, by a written order, the owner of any undertaking to carry on any such trade practice, such trade practice, though monopolistic in nature, shall not be deemed to be prejudicial.

The definition of 'monopolistic trade practice' [Section 2(i)] has been enlarged by the Amendment Act, 1984, so as to incorporate therein the provisions of Section 32 as stood prior to its amendment. This is not to say that the concept of public interest embodied in the old Section 32 is now inherent in the revised definition of 'monopolistic trade practice'. The definition had to be expanded because of the overlapping provisions of Section 2(i) and Section 32 prior to their amendment.

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STUDY—XIV

Restrictive Trade Practices and Unfair Trade Practices.

Restrictive Trade Practices

Registrable Agreements Relating to Restrictive Trade Practice—Registration of Agreements— Upkeep of the Register.

Unfair Trade Practices

Definition of Unfair Trade Practice—Inquiry into Unfair Trade Practices by Commission—Investigation by Director General before an issue of process in certain cases—Power of the Commission inquiring into an unfair trade practice—Power relating to restrictive trade practices exercisable in relation to unfair practices.

Control of Certain Restrictive Trade Practices

Investigation into restrictive trade practice by the MRTP Commission—Presumption as to the public interest—Special conditions for avoidance of conditions for maintaining re-sale price Prohibition of other measures for maintaining re-sale price Power of Commission to exempt particular classes of goods from Sections 39 and 0.

Prescribed Readings : MRTP— Compendium by *A.M. Chakr borty*, 1984 Edition (Taxmann Publication)

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This Study Paper deals with Chapters V and VI of the Act. Chapter V, as amended by the 1984 Amendment Act, relates to restrictive trade practices and unfair trade practices. This Chapter is divided into two parts—Part A dealing with registration of agreements pertaining to Restrictive Trade Practices and Part B with Unfair Trade Practices. Certain well-known trade practices like false and misleading advertisements, bargain and switching, conducting promotional contests, hoarding and destruction of goods, etc, have been tried to be regulated by the provisions contained in Part B in the same manner as the restrictive trade practices are regulated.

Chapter VI deals with the control of certain restrictive trade practices. Such control is exercised through the Government machinery.

Registrable agreements relating to restrictive trade practice : *Section 33 (as amended by the 1984 Amendment Act)* states that every agreement which falls within any one or more of the following 14 categories shall be deemed to be an agreement relating to restrictive trade practices ;

(a) any aereement which restricts or is likely to restrict by any method the persons or class of persons to whom goods are sold or from whom goods are bought. This clause is also known as *Refusal to deal* with particular persons or class of persons and the *Right to select Customers*. This clause seems to cover not only agreements among buyers or among sellers restricting the freedom of the parties to such agreements to trade with others, but also even an agreement between a buyer and a seller to the effect that the fomer will buy only from the latter and the latter will sell only to the buyer ;

(b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. This is a *tying arrangement* (or full-line forcing). It takes place when the intending purchase of an article is compelled by the producer or seller to buy another additional article produced or sold by him as a condition of the purchase of the first-mentioned article. The essence of such an agreement is the forced buying of a second distinct article along with the desired purchase of a particular product. This results in a "tied" market or "clubbed" sale which harms competition.

(c) any agreement resticting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. This is also known as "*Exclusive dealing*". The type of such dealing contemplated by this clause is the one that flows from bilateral agreements. In effect, the prohibition under this clause on the purchase is in relation to dealing in competing goods of the seller. This particularly may be resorted to through any one or more of the devices like—(a) requiring the purchaser of goods to purchase exclusively from the seller which would include a commitment by a purchaser to buy his entire requirements of the goods from a single seller ; (b) requiring the seller to sell only such part of the goods as is in excess of the requirements of the buyer;

(c) seller agreeing not to sell to other buyers or to sell to buyers (other than those who agree to buy exclusively from the seller) only on terms and conditions which will favour exclusively buyer ; or (d) buyer agreeing to buy from another on the condition that the latter would also buy from the former (reciprocal arrangement). By and large, exclusive dealership goes with allocation of an area to a distributor for dealing in the product. The prohibition on dealing in competing goods is absolute inasmuch as the distributors are restricted from dealing in the competitor's goods not only in their own area but also in other territories ;

(d) any agreement to purchase or sell goods or to tender for the sale or the purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers. This is "*Collective agreement*" or "Price fixing in a concerted manner". Almost every type of agreement relating to restrictive trade practice, so long as it is sought to be given effect by means of an agreement between sellers or by means of an agreement between buyers, may be covered under this clause. Thus, all arrangements or understandings between manufacturers or suppliers of goods which tend to retard competition may fall within the ambit of this clause. The essence of cartel is the implementation of the decision taken at the level of suppliers or putting into practice of some concerted design, which would have the effect of preventing, restraining or distorting competition. Almost all types of cartels (e.g., Price Cartel whereby the sellers agree on certain prices or on the maintentance of certain price level or on the adoption of certain methods for determining prices ; Quota Cartel whereby the suppliers agree to themselves to allocate certain share of the market to each ; Allocation Cartel, a slight variation of the quota cartel, whereby the suppliers may allocate to themselves certain territories, certain parts of the market or certain customers ; Specialisation Cartel, i.e., where the goods are complementary, an agreement may be reached between the suppliers to specialise on individual supplier level in the supply of one of the complementary goods, etc.) are covered by this clause :

(e) any agreement to grant or allow concessions or benefits including allowances, discounts, rebates or credit in connection with, or by reason of, dealings. This is known as *Discrimination in Dealings* which involves a differentitation in which some enterprises or consumers are given preference over others, particularly in the treatment of purchasers by a seller, such discrimination not being warranted by differences in the circumstances of the transaction. The differentiation or discrimination may relate to prices, terms of sale, or the quality or quantity of what is supplied and may extend to refusal to sell. Among the various forms of allowing discount are cash discount (i e., one granted for payment in cash upon delivery or within a specified short period), functional discount (i.e., a reduction from the normal price granted to a purchaser who, as a buyer, characteristically performs a particular economic function such as wholesaling or retailing), quantity discount (i.e., on the amount of which depends on the quantity purchased in a single transaction or during a certain period of time, as a rule

according to the steps of a Schedule). Rebates may broadly be classified as aggregated rebate (i.e., rebate calculated in terms of all purchases made with a group of designated sellers), loyalty rebate (i.e. one granted to a purchaser who purchases exclusively from one or more specified sellers for a given period), and natural rebate (i e., one granted to a purchaser in the form of additional products of the kind purchased) ;

(f) any agreement to sell goods on condition that the prices to be charged on re-sale by purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. Thts is known as *Re-sale Price-Maintenance* "Wherever a manufacturer sets the price at which a retail shop which he does not own must re-sell his products to the public or at which a wholesale business he does not own must re-sell that product to a retailer, the practice is known as "re-sale price maintenance". This practice which is widely in vogue in India as elsewhere can take any of the three forms, viz. (1) A minimcm price below which the products may not be sold ; (2) A maximum price above which the product may not be sold ; and (3) A stipulated price from which no variation is allowed. "Resale price maintenance is a restrictive practice. It eliminates price competition in the distribution of price-maintained goods. It also serves as a restraint upon competition among manufactures". Fixing minimum re-sale price is outright prohibited (vide Sections 37 to 41 to be discussed later). Re-sale at a fixed price, whether minimum or maximum, falls under clause (*f*) and would be a *restrictive trade practice* if so established in terms of Section 2 (o). The expression "unless it is is already stated that prices lower than those prices (as stipulated by the seller) may be charged" is obviously intended to cover the simple case of fixing maximum re-sale price :

(g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods. This clause covers two practices, namely —(i) exclusive dealership, and (ii) allocation of areas or markets to sole distributors. All such agreements are restrictive in nature and have the potential to adversely affect competition. They should, therefore, be scrutinised and their impact on public interest assessed ;

(h) any agreement not to employ or restrict the employment of any method machinery of process in the manufacture of goods. All agreements which restrict the use of methods, machinery or process in the manufacture of goods may have the effect of eliminating competition among producers and reducing the availability of goods to the public. It may be recalled that this clause echos Section 20 (o) (i) (i.e., the first part of the definition of "restrictive trade practice") as covering a trade practice which prevents competition by tending to thwart the flow of capital or resources into the stream of production. A restrictive

trade practice of this kind can also be shown to fall easily under Section 2 (i) relating to the definition of monopolistic trade practice".

(i) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on in good faith the trade in relation to which the trade association is formed. This is known as *Boycott* from trade association membership;

(j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor. This is known as *Price — control agreements* for eliminating competition and competitors;

(ja) any agreement restricting in any manner the class or number of wholesalers, producers or suppliers from whom any goods may be brought;

(jb) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction sale;

(k) any agreement not hereinbefore referred to in Section 33, which the Central Government may, by notification specify for the time being, as being one relating to a restrictive trade practice within the meaning of sub-section (I) of Section 33 pursuant to any recommendation made by the Commission in this behalf. This is a *Residuary clause* to enable the Central Government to include any other restrictive trade practice not falling under clause (a) (jb). This can be done only on the recommendations of the MRTP Commission.

(I) any agreement enforce the carrying out of any such any agreement as is referred to in Section 33 (1).

The above categories of agreements shall be subject to registration in accordance with the provisions of Chapter V.

Section 33 (2) merely provides that Service Agreements are covered in the same way as agreements relating to production, storage, supply, distribution or control of goods under Section 33 (1).

Section 33 (3) speaks of the Exempted Agreements. Accordingly, any agreement falling within Section, 33 shall not be registrable in accordance with the provisions of Chapter V, if it is expressly authorised by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement. The underlying assumption is that any agreement which is authorised under any law or by the Government (Central or State) cannot be prejudicial to public interest. In J.K. Synthetics and Others (R.T. P. Inquiry No 6 of 1973), the MRTP Commission held that the approval of that Government for purposes of Section 33(3) can only be by an appropriate Department of the Government which deals with the MRTP Act, viz, the, Ministry of Law, Justic and Company Affairs and that any express or implied approval of the agreement by the Ministry of Commerce was not an approval under Section 33 (3.) But this view was not upheld by the Allahabad High Court in an appeal, although the

right of the Commission to enquire under Section 37 into agreements non-registrable under Section 33(3) was upheld. It was upheld that the Ministry of Commerce, being as per the Allocation of Business Rules the administrative Ministry for regulation of price and distribution of nylon yarn, was the appropriate authority to accord approval to such agreements and that this jurisdiction did not lie with the Ministry of Law, Justice and Company Affairs as held by the Commission. Applying the test of collective responsibility of the Cabinet, the Allahabad High Court held that the agreement had the requisite approval of the Government.

In the Allied Distributors' case. the Commission dismissed the contention that Section 294 of the Companies which prohibited the appointment of sole selling agents for more than 5 years, could be said to express authorisation of sole selling agents. For the same reasons, it also rejected the contention that the Indian Contract Act authorised sole selling agents.

[N.B. Section 34 has been omitted by the 1984 Amendment Act. The omission has been necessary by reasons of the provisions of Section 8 as substituted by the 1984 [Amendment Act.]

Registration of Agreements : Section 35 (in which consequential amendments have been made by the 1984 Amendment Act) provides that every agreement falling within Section 33 shall be registrable. It empowers the Central Government to specify the day on (hereinafter referred as 'the appointed day") and from which such agreement shall be registered [sub section (1)].

Within 60 days from the appointed day in the case of an agreement existing on that day, and in the case of an agreement made after the appointed day, within 60 days from the making there of, the following particulars regarding any of the 14 categories of agreements (mentioned in Section 33) have to be furnished to the Director General of Investigation and Registration :

(a) the names of the persons who are parties to the agreement ; and

(b) the whole of the terms of the agreement [*sub-Section (2)*].

If, after the registration of the agreement, it is varied (whether regarding parties or terms) or determined othewise than by efflux of time, then the particulars of such variation or determination have to be furnished to the Director General within one month of such variation or determination [sub-Section (3)]. Thus, any variation in the agreement has to be reported to the Director General within one month of the variation. Variation also includes premature determination of the agreement, i.e., determination before the time stipulated in the agreement has run out.

The particulars to be furnished as aforesaid have to be furnished—

(a) In so far as the agreement or any variation or determination of the *agreement is made by an instrument in writing*—by the production of the original or a true copy of that agreement : and

(b) In so far as the agreement or any variation or determination of the agreement is *not made* by an instrument in writing—then by the

production of memorandum in writing and signed by the person by whom the particulars are furnished (sub-Section (4).)

The particulars to be furnished under Section 35 must be furnished by or on behalf of the person who is a party to the agreement, or as the case may be, was a party thereto immediately before its determination. If the particulars have been duly furnished by such person or his duly authorised agent, then the provisions of this Section shall be deemed to have been complied with by all such persons (sub-Section (5). It is thus clear that there may be several parties to an agreement ; it would be enough if one of the parties to the agreement furnishes the particulars which would be deemed to have been filed by all other parties to the agreements. But this sub-section does not clarify whether the particulars must necessarily be furnished where the Act applies only to one of the parties to the agreement but does not apply to the other, For example, suppose that Section 3 is interpreted in a manner which would show that exemption is available not only to undertakings owned by Government companies but also to the Government companies themselves and one of the parties to an agreement falling within Section 33 happens to be a Government company, whereas other party to the agreement happens to be a private party. In a situation like this the question remains as to whether or not the private party is required to furnish the particulars to the Director General under Section 35 and when such a party furnishes the particulars, whether the Government company would also be deemed to have furnished the particulars to the Director General. On a plain interpretation of sub-section (5), it would appear that the particulars furnished by the private party would also be deemed to have been furnished by the Government company.

Where any agreement subject to registration under Section 35 relates to the production, storage, supply distribution or control of goods or the performance of any service in India and any party to the agreement *carries on business in India*, the agreement shall be deemed to be an agreement within the meaning of Section 35, even, if *any other party* to the agreement *does not carry on business in India* (Explanation 1).

If an agreement is made by a trade association, the agreement, for the purpose of Section 35, shall be deemed to be made by all persons who are members of the association as if each such person were a party to the agreement (Explanation II).

The trade association may make specific recommendations, express or implied to its associates (members) as to the action to be taken or not to be taken. In such situations, Section 35 shall apply in relation to the agreement for the constitution of the association even if there exists any provision to the contrary. It will be assumed that the agreement contained such a term as if each member has agreed to comply with those recommendations and also any subsequent recommendations affecting earlier recommendations (Explanation III). Thus, this Explanation clarifies that where any recommendation, specific or implied made by a trade association has the effect of being a restrictive trade practice falling within the purview of Section 33, no plea that such a recommendation is not binding on the members of that association will be accepted. In such a situation, law will

assume as if the association's constitution contains a term that the recommendations of the association will be binding on its members. One may not be confronted with much difficulty in so far as there is a specific recommendation. For example, a recommendation telling its members not to supply goods except on terms providing for an indemnity from the dealer is a specific recommendation, even though the terms of the indemnity are left to the individual member to settle (*Re Finance Houses Association Ltd 's Agreement LR (1965) 5 R.P. 366*). However, one may have to grapple with considerable difficulty in establishing an 'implied' recommendation. It can be established only, by studying the conduct of the members and relating it to the alleged "implied" recommendation. This may involve long legal battles. However, Explanation III gives rise to an obligation to register the constitution of the association together with the recommendation. Even a member who considers himself not bound by the recommendation and who in fact has not given effect to it has the obligation to register it. This Explanation creates a legal fiction that the constitution of a trade association contains a clause obliging all members to comply with these association's recommendations (*Federation of Wholesale and Multiple Banker' Agreement, (1960) 1 All ER 227*). The constitution of the association must be read as if an agreement to comply with such recommendations formed one of the terms of the agreement for the constitution, notwithstanding any provision to the contrary (*Re Wholesale Confectioners' Alliance Agreement (1960) 1 All ER 227*). The net effect is that all agreements made by trade associations and recommendations made by them to members are agreements to be registered under Section 35 if they amount to trade practices as enumerated in Section 33.

It should be emphasized that as per Section 48, the failure to comply with the obligation to register an agreement which is registrable is punishable with imprisonment for a term extending to 3 years or with fine extending to Rs. 5,000/- or with both, and in case of continuance of the offence with a further fine extending to Rs. 500/- for every day the failure continues.

Upkeep of the Register : Section 36 provides that the Director General of Investigation and Registration shall keep a Register in the prescribed form and enter therein the prescribed particulars as regards agreements subject to registration [sub section (1)].

The Director General shall provide for the maintenance of a Special Section of the register ; therein shall be entered or filed such particulars as the Commission may direct. Such particulars are : (a) particulars containing information, the publication of which would, in the opinion of the Commission, be contrary to the public interest ; (b) particulars containing information as to any matter which, in the opinion on of the Commission, would substantially damage the legitimate business interests of any person (sub section (2)).

Section 36 thus envisages the upkeep of (1) a General Register of all agreements : and (2) a Special Section of the Register. By implication it follows that while the general register will be open to public inspection, the Special Section will not be.

Sub section (3) provide that it is open to any party to an agreement registrable under Section 35 to apply to the Director General (1) for the inclusion of an agreement or any part thereof in the Special Section, or (2) for the exclusion of an agreement or any part thereof from the requirement of registration on the ground that it has no substantial economic significance. Such an application is to be referred to the Commission by the Director General and will be disposed of by him according to the general or special instructions issued by the Commission. Thus, under Section 35, the actual authority rests with the Commission and it also contemplates the making of regulation by the Commission under Section 66. The provision relating to the exclusion of an agreement, which is of no substantial economic significance for the requirement of registration, is very natural. A restrictive trade practice is not an evil in itself, but is so only in so far as it is injurious to the public. Thus, an agreement which is restrictive in form but has no economic significance from the standpoint of public interest, is as good as non-existent for the purpose of the MRTP Act.

Definition of Unfair Trade Practice : Section 36A (newly added by the 1984 Amendment Act) provides that in Part B of Chapter V, unless the context otherwise requires, "unfair trade practice means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services. adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise. Such practice as aforesaid are stated hereunder :

1. The practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, grade, composition, style or model ;

(ii) falsely represents that the services are of a particular standard, quality or grade ;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods ;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have ;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller does not have ;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services ;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof. However, if a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence ;

(viii) makes to the public a representation in a form that purports to be (a) a warranty or guarantee of a product or of any goods or services, or (b) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has received a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect, that such warranty, guarantee or promise will be carried out ;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services have been or are ordinarily sold or provided. For this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by the sellers or provided by suppliers generally in the relevant market, unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the reprensentation is made ;

(v) gives false or misleading facts disparaging the goods, services or trade of another person.

The statement referred to in (I) above may be one : (a) which is expressed on an article offered or displayed for sale, or expressed on its wrapper or container ; or (b) which is expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, expressed on anything on which the article is mounted for display or sale ; or (c) which is contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public. Such a statement shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained.

(II) The practice which permits the publication of any advertisement whether in any newspaper or otherwise for the sale or supply at a *bargain price*, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement. The bargain price, italicised above, means—(a) a price that is stated in the advertisement to be bargain price, or (b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

(III) The practice which permits—(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or party covered by the amount charged in the transaction as a whole ; (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of directly or indirectly promoting the sale, use or supply of any product or any business interest.

(IV) The practice which permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers when the adopter of the practice knows or has reason to believe that the goods do not comply with standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishings or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods.

(V) The practice which permits the hoarding or destruction of goods or the refusal to sell the goods or making of the goods available for sale or providing of any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise the cost of those or other similar goods or services.

Thus, if any one of the aforesaid kinds of trade practice is adopted, it will be an unfair trade practice.

Inquiry into unfair trade practice by the MRTP Commission : Section 36B empowers the Commission to enquiry into any unfair trade practice in the following circumstances :

(a) when it receives a complaint of facts constituting such practice from any trade or consumers' association having a membership of not less than 25 persons or from 25 or more consumers ; or

(b) when the Central Government or State Government makes a reference to the Commission ; or

(c) When the Commission receives an application from the Director General ; or

(d) when the Commission upon its own knowledge or information.

Investigation by Director General before an issue of process in certain cases : Under Section 3oC, in respect of any unfair trade practice of which complaint is made to the Commission mentioned in Section 36B (a) above, the Commission shall, before issuing any process requiring the attendance of the person complained against, cause preliminary investigation to be made by the Director General, in such manner as it may direct, for the purpose of satisfying itself that the complaint requires to be inquired into.

Powers of the Commission inquiring into an unfair trade practice : Section 36D empowers the MRTP Commission to inquire into any unfair trade practice which may come before it for inquiry. After such inquiry if the Commission comes to form the opinion that the practice is prejudicial to the public interest or to the interest of any consumer or consumers generally, it may be order issue certain directions. These directions are : (a) that the practice shall be discontinued or shall not be repeated ; (b) that any agreement relating to such unfair trade practice shall be void or shall stand modified in respect thereof in such manner as may be specified in the order [sub-section (1)].

Instead of making any order as aforesaid, the Commission may permit any party to carry on any trade practice, if they party so applies and takes such steps

within the time specified by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest or to the interest of any consumer (s) generally. In any such case, if the Commission is satisfied that the necessary steps have been taken by the party within the specified time, it may decide not to make any order under this Section in respect of that trade practice [sub-section (2)].

An order shall not be made under sub-section (1) in respect of any trade practice which is expressly authorised by any law for the time being in force [sub-section (3)].

Power relating to restrictive trade practices exercisable in relation to Unfair trade practices : Section 36E provides that without prejudice to the provisions of Section 12A (relating to Commission's power of granting temporary injunctions), Section 12B (pertaining to Commission's power of awarding compensation) and Section 36D, the Commission, Director General or any other person authorised in this behalf by the Commission or Director General may exercise or perform, in relation to any unfair trade practice, the same power or duty which it or he is empowered or required by or under this Act to exercise or perform in relation to restrictive trade practice.

CONTROL OF CERTAIN RESTRICTIVE TRADE PRACTICES

Chapter VI of the Act containing Sections 37 to 41 deals with the control of restrictive trade practices. These provisions are discussed hereunder.

Investigation into restrictive trade practice by the MRTP Commission : Section 37 (as modified by the Amendment Act of 1984) seeks to clarify that it would apply if the practice is a monopolistic practice, whether or not the undertaking indulging in such practice is a monopolistic undertaking.

The Commission is empowered to inquire into any trade practice, whether or not the agreement (if any) relating thereto has been registered under Section 35, which may come before it for inquiry. In this context, it may be noted that the inquiry under Section 37 is in the nature of disciplinary proceeding against a business undertaking alleged to be indulging in anti-social practice and the consequence of the inquiry is an injunction restraining the continution of the anti-social practice ; further that the Commission, in an inquiry under Section 37, is not at all concerned with the question of registrability of an agreement. Albeit, the Commissions' inquiry goes beyond an agreement inasmuch as the Commission is required to find whether the practice exists and not whether the agreement exists.

Sub section (1) further states that if after the aforesaid inquiry the Commission is of the opinion that the practice is prejudicial to the public interest, it may by order make certain directions. These directions are :

(a) That *the practice shall be discontinued or shall not repeated.* This italicised phrase has to be understood conjunctively because a mere discontinuance without enjoining upon the persons indulging in the

restrictive trade practice that the practice must also not be repeated in future would be futile. This phrase simply denotes that the practice shall not only be discontinued forthwith but also must not be continued in future. Thus, the Commission is empowered by this clause to pass "cease and desist" order ;

(b) That the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order. It may be noted that almost all decisions under this clause, barring a few exceptions, are "consent" orders and the parties have been consenting to the passing of the order "without prejudice to the contention that the practice complained of does not constitute restrictive trade practice".

In most cases where consent orders have been passed, the parties have agreed to modify their agreement on their own or at the direction of the Commission to take away those clauses or wordings in the agreement which have been alleged to be objectionable on the ground that they are restrictive in character.

Under Section 37(2), the Commission may, instead of making any order under this Section, permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in this behalf by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest and in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under Section 37 in respect of that trade practice. It may thus be noted that the Commission, can entertain an application under Section 37(2) without first holding an inquiry under Section 37(1). In an application under Section 37(2), there is an *assumption* that a restrictive trade practice in existence is *prejudicial to public interest* ; on this assumption alone that an application can be made under Section 37 (2) and instead of making an order under Section 37 (1), the Commission can approve a scheme which would eliminate the restrictive trade practices or to make the trade practice no longer prejudicial to the public interest. The entire gamut of inquiry need not be gone through for coming to the conclusion that as to the existence of a trade practice prejudicial to the public interest before the scheme could be approved by the Commission.

It is thus evident that Section 37(2) clearly envisages two steps : 1. permission by the Commission to the party to take certain necessary steps to ensure that the trade practice was no longer prejudicial to the public interest. These steps are to be taken within the time prescribed by the Commission in this regard ; 2. Commission to be satisfied about the aforesaid necessary steps having been taken by the party within the stipulated time. On such satisfaction, the Commission has to decide not to make any order under Section 37.

Section 37 (3) contemplates exclusion of certain practices from inquiry under sub-section (1). These are as follows :

(a) Any agreement between buyers relating to goods which are bought by the buyers for *consumption* and *not for ultimate resale* whether in the

same or different form; type or specie or as constituent of some other goods. That is to say, this clause exempts any collective agreement between buyers from the ambit of Section 37 where the subject-matter of collective agreement is "goods for final consumption and not intermediate goods". The buyers who enter into collective agreements are the final consumers of such goods;

(b) A trade practice which is expressly authorised by any law for the time being in force.

Under Section 37 (4), nothwithstanding anything contained in this Act, if the Commission, during the course of an inquiry under sub-section (1), finds that the owner of any undertaking is indulging in monopolistic trade practices, it may, after passing such orders under sub-section (1) or sub-section (2) with respect to the restrictive trade practices as it may consider necessary, submit the case along with the findings thereon to the Central Government for such action as that Government may take under Section 31. It may be noted that the power of the Commission to make inquiry into monopolistic trade practice is derived not only from Sections 10 and 31 but also from Section 37 (4). The power of inquiry under Section 37 is similar to the power of *suo motto* inquiry under Section 10. Therefore, Section 37 (4) and Section 10 (b) have to be read together. Section 10 (b) does not, however, confer power on the Commission to make a report to the Central Government. This power is actually contained in Section 31 (2).

Presumption as to the public interest: Section 38 (as amended by the 1984 Amendment Act) deals with this topic. The concept of public interest runs throughout the Act. It may be noticed that the preamble to the Act is the catchment from which springs forth the presumptions as to public interest made in Chapter III pertaining to concentration of economic power (vide Section 28). Chapter IIIA (newly added) dealing with restrictions on the acquisition and transfer of shares of or by certain bodies corporate (vide Section 30E), Chapter IV relating to monopolistic trade practices (vide Section 32) and Chapter VI dealing with restrictive trade practice (vide Section 38). It is true that the concept of public interest is not wide, but nonetheless it precisely defines the tests laid down in Section 38, which are at least specific to the extent of giving an opportunity to the respondent charged with indulging in restrictive trade practices to show that public interest is likely to be advocated, and not hindered.

Section 38 provides that for the purposes of any proceeding before the Commission under Section 37, a resstrictive trade practice shall be deemed to be prejudicial to the public interest, unless the Commission is satisfied of any one or more of the following circumstances. In order words if the Commission is satisfied about any one of such circumstance, a restrictive trade practice will not be deemed to be prejudicial to the public interest. The aforesaid circumstances also popularly known as Gateways, are as under;

(a) **Protection against inquiry:** That the restriction is *reasonably necessary* having regard to the character of the goods which it applies, to protect the public against inquiry (whether to persons or it premises) in connection with the consumption, installation or use those goods,

The italicised expression above should be interpreted in the light of the restriction imposed ; therefore, it should be ensured that the restriction imposed is not such as is *more than* reasonably necessary [*Horner* v. *Graves 131 ER 284*]. What should be looked at while applying the test of reasonable necessity, is *not the object* of the restriction but the *effect* which the restriction might have in ensuring public safety or preventing public injury [*In re. Tyre Trade Register Agreement (1963) LR 3 RP 404*] For the purpose of showing that the effect of the restriction would be to ensure public safety or to protect public from injury, it is but necessary for the Court to be satisfied that in the absence of the restriction contemplated, the risk of injury to public would be something real. It should not be justified on the mere argument that in the absence of the restriction, there would be some chance of injury being caused to the public [*In re Chemists' Federation Agreement (No. 2) (1958) LR 1 RP 75. Also see RRTA* v. *Usha Sales Pvt. Ltd. (1977) 47 Comp. Cas. 472 (MRTPC) ; 1976 Tax LR 2094*]. If it could be shown that public safety would be definitely ensured there would be a presumption in favour of the respondent that the restriction would bring about protection against injury [*In re. Tyre Trade Register Agreement (1963) LR 3 RP 404*]. The need for protecting the public in the matter of consumption of goods and installation and use of goods is required to be considered with an eye to the character of the goods. Thus, where the supply of insulin is restricted to listed wholesalers who are competent to handle insulin in a proper manner, such restriction can be said to be in the interest of the paublic as far as the consumption of insulin was concerned [*Insulin Report*]. Likewise, a restriction by way of refusal to give discounts to wholesalers qualified to handle cables to be installed for heating applicances, electric motor, etc., could be treated as a reasonable restriction for protecting, public injury which is likely to emanate from installation of cables [*Insulated Wires and Cable Reports*].

A survey of the decided cases in respect of protection of public interest against injury would reveal that the envisaged injury is physical injury rather than financial injury. In *RRTA* v. *Spencer & Co. Ltd., 1978 Tax LR 2277 (MRTPC)* the respondent pleaded that even financial injury is an injury contemplated under the above-mentioned clause (a). But the Commission, rejecting this plea held that there was no justification in the plea of the respondent that the removal of territorial restriction would deny to the public as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages accruing from after sale service;

(b) **Specific and substantial benefits or advantages to the public :** That the removal of the restriction would deny to the *public* as purchasers, consumers or users of any goods, other *specific* and *substantial* benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting thereform.

It may be noted that the word 'public' italicised above, means not the public as a whole but only that section of the public which is comprised of purchasers, consumers or users of goods for the purpose of proving that removal of restriction would deny to the public the specific advantages or benefits. But, for fulfilling the other condition that was no detriment to the public, the word 'public' may be given the widest interpretation [*In re. Black Bolt and Nut Association's Agreement (No. 1) (1960) L.R. 2 RP 50)* ; also see *Usha Sales Pvt. Ltd. (1977) 47*

Comp. Cas. 472 (MRTPC)]. Also, it is unnecessary to prove that the entire section of the public comprising of purchasers, etc., must be affected by the removal of the restriction ; it would be sufficient if it is shown that some sufficiently important section of the public comprising of purchasers, etc., would be affected (*In re. Net Book Agreement (No. 1) (1962) L.R. 3 RP 246*).

It appears that the term 'specific' signifies that the benefit must be something which is not only definable but is of special character [*In re. Permanent Magnet Association's Agreement (No. 1) (1962) L.R. 3 RP 119*)]. The Court which is considering the question of substantial benefits to the public must not deny the plea of substantiality of the benefit only on the ground that the benefits are not quantifiable *in present*. The Court should consider the question of benefit to the public and the degree of substantiality not merely in relation to present quantity but also in relation to time and its probable effect on future quantity (*In re. Finance Houses Association Ltd.'s Agreement (1965) LR 5 RP 366*). In spite of the employment of the word 'substantial', the respondent need not quantify or indicate the proportion of the benefits. The Court has to proceed, while deciding the question of substantiality, on either of the hypotheses, *viz.*, (a) whether the public would continue to get the benefits in the case of the practice being allowed to continue ; (b) whether the public would lose the benefits in case the practice in discontinued (*In re. Finance Houses Association Ltd.'s Agreement, supra*). If the discontinuance of the practice would deny the public only a mere inconvenience, the restriction cannot be justified under clause (b) (*In re. Federation of British Carpet Manufacturer's Agreement (1959) LR 1 RP 472*) :

(c) **Countervailing Restriction :** That the restriction is reasonably necessary to counter-act measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged.

It may be noticed that the emphasis is on the phrase "any one person" and the most crucial word is "one" in this phrase. Section 38 (2) explains the reference to "any one person" and this reference includes two or more persons being inter-connected undertakings or individuals carrying on business in partnership with each other. This patently suggests that measures have to be taken by one person, and only in special circumstances, inter-connected undertakings or partners in a business or to be treated as one person. Whether, in actual fact or by fiction of law, it is only one person that is to be taken in account (*RRTA* v. *Usha Sales Pvt. Ltd. (1977) 47 Comp. Cas. 472 (MRTPC)*. Thus, Section 38(1) (c) is concerned only with the defensive measures against a single monopolist.

Clause (c) deals with a case where defensive measure is reasonably necessary against restrictive measures taken by any one person ; it would not, therefore, apply where the action is taken by a group of persons in association. For instance, a restrictive action by manufacturers to meet restrictive action by distributors would not be justified under this clause ;

(d) **Negotiating fair terms with a large supplier or producer :** That the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from. any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls a preponderant part of the market for such goods.

This clause is in two parts. The first part deals with cases where the parties wish to maintain a restriction on the ground that they face a person who is himself a trader controlling a *preponderant* part of the trade or business. The italicised word is of much importance and the Court has given some assistance in interpreting the same. *In re. Water—Tube Boiler-makers' Association Agreement (1959) LR 1 RP 285*, it observed thus : "We do not propose to attempt any definition of the word 'preponderant' ; it seems to us that it must be a question of fact in all the circumstances of each particular case as to whether or not a particular purchaser can be so described". *In re, National Sulphuric Acid Associations' Agreement (1963) LR 4 RP 169*, it was held that while the relative size of the part was important, it was not necessary that the respondents had to show that it exceeded 50%. It was a question of fact to be decided in the light of all relevant circumstances including the actual or potential power of the seller. Despite the present tense of the *verb* 'control', the Court should look to the future as well as the present, since a restriction may not be *reasonably necessary* if an existing preponderance is likely to be short-lived.

The second part of clause (d) grapples with a situation in which the acquirer of the goods. without being a trader of those goods, controls a preponderant part of the market for such goods. Even in such cases, a party can justify a restriction as being reasonably necessary in order to enable it to deal with a monopoly buyer or supplier trying to obtain unfair terms by virtue of his predominant or monopolistic position. In *Water Tube Boiler-makers' (Supra)* case the Court rejected the contention under this clause as not being reasonably necessary. In *National Sulphuric Acid's (Supra)* case, the Court held that the expression "fair terms" should be regarded as commercial terms on which an efficient manufacturer can sell his goods at reasonable profit. In *re Associated Transformer Manufacturers' Agreement (1961) LR 2 RP 295 at p. 342*, it was held that whether or not there was a disposition on the part of the praponderant buyer to force unreasonable terms had an important bearing in invoking clause (d) ;

(e) **Adverse effect on Unemployment situation :** That, having [illegible] to the conditions actually obtaining or reasonably foreseen at the [illegible] of the application, the removal of the restriction would be *likely* to have a serious and persistently adverse effect on the general level of unemployment in an area, or in cases taken together, in which a substantial proportion of the trade, or industry to which the agreement relates is situated.

For setting up the defence under this clause, it is not necessary to show that general level of unemployment will increase if the restriction is removed but it is also necessary to show that but for the restriction, the level of employment cannot be maintained. That is to say, other factors are not likely to supervene to take care of the unemployment situation when the restriction is removed. The expression. "In area or in areas taken together" resembles the other expression, *viz.* "India or any substantial part thereof", used in the MRTP Act. So far as clause (e) is concerned, it is enough to show that the level of employment where the trade or industry is located, would go down in a *particular locality* or area. [Note the use of the expression "particular locality" in Section 13(3)].

The word "likely" appearing in clause (e) may be held to mean : (a) that the event specified is more probable than the contrary ; or (b) that the removal of the restriction may be the cause of producing the specified effect ;

(f) **Substantial reduction in Export earnings** ; That, having regard to the conditions actually abtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or *earnings* of the export business which is *substantial* either in relation to the whole export business of India or in relation to the whole (including export business) of the said trade or industry.

If the respondent desires to set up the defence under this clause, he has to show that there would be a substantial reduction in export earnings. It is true that the word "substantial" has not been used as an adjective qualifying the noun "reduction". But even then, if the clause is read as a whole, it would indicate that the word "substantial" refers to "reduction" and not to export business of India or of the business of the respondent. The reduction, referred to, may be in relation to the volume of exports or in relation to *earnings* from export. In as much as the clause speak of earnings and not net earnings, the presumption is that earnings could be at their gross value, i,e., without taking into account the outgo in foreign exchange by way of "imported materials" which go into the earnings by way of exports [*In re. Federation of British Carpet Manufactures' Association* (*Supra*)] ;

(g) **Ancillary restriction** : That the restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Commission not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Commission.

Thus under this clause, the Commission has got to be satisfied that the restriction is reasonably necessary for maintaining any other restriction accepted by the parties, which has already been found by the Commission not to be contrary to public interest on the grounds other than those specified in this clause or had been so found in previous proceedings before the Commission ;

(h) **Restriction not affecting Competition materially** : That the restriction does not directly or indirectly restrict or discourage competi-

tion to any material degree in any relevant trade or industry and is not likely to do so.

This is a general clause that can justify an agreement if it can be shown that it does not discourage competition, nor is likely to do so in future. It would permit to plead that restrictions contained in an agreement are not contrary to the public interest, as they do not restrict or discourage competition to any material degree. This clause is primarily designed to afford protection to harmless agreements. Unlike other gateways mentioned above which are concerned with the positive effect on restrictions under inquiry, the gateway under this clause is concerned with the marginal, minimal or negligible effect of restriction itself ;

(i) **Restriction authorised by the Central Government :** That such restriction has been expressly authorised and approved by the Central Government ;

(j) **Restriction necessitated by Defence consideration :** That such restriction is necessary to meet the requirements of the defence of India or any part thereof : or for the security of the State ; or

(k) **Restriction in respect of essential goods and services :** That the restriction is necessary to ensure the maintenance of supply of goods and services essential to the community.

The clauses (i), (j) and (k) have been newly incorporated by the MRTP (Amendment) Act 1984, with a view to expanding the scope of exceptions which a party can plead in order that a particular restrictive trade practice may be permitted in public interest.

In addition to being satisfied with any one or more of the above mentioned circumstances, the Commission has got to be further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.

Sub-section (2) explains two sets of expression employed in Section 38. The first relates to the word "purchasers", "consumers" and "users". It has been clarified that these words include persons purchasing, consuming or using for the purpose or in the course of trade or business or for public purposes. The second relates to the expression "any one persons". It has been clarified that this expression includes any two or more persons being inter connected undertaking or individuals carrying on business in partnership with each other.

Special conditions for avoidance of conditions for maintaing re-sale price : Under Section 39 (1), any term or condition of a contract for the sale of goods by a person to a wholesaler or retailer or any agreement between a person

and a wholesaler or retailer relating to such sale shall be void in so far as it *purports to establish* or provide for the establishment of minimum prices to be charged on the resale of goods in India. It may be noted that this provision is operative without prejudice to the provisions of this Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act.

Section 39 (2) provides that no supplier of goods (whether directly or through any person or association of persons acting on his behalf) shall notify to dealers or otherwise publish on or in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of goods in India. Thus, this provision forbids the trade association from aiding in any way such a practice. Section 39(3) extends this prohibition of resale price maintainance even to patended goods (including articles made by a patended process or made under any trade mark), though the proviso thereto states that the validity of any term or condition of a license granted by the proprietor of a patent or trade mark or by a licensee or assignee of patent or trade mark which regulates the price of any patended article is not affected by the Section even though such regulation of price seeks to fix a minimum price at which the patended article may be sold by the proprietor, licensee or assignee.

According to the Explanation to Section 39, the term "supplier", occuring in this Section as well as in Section 40, means a person who supplies goods to any person for the ultimate purpose of resale and includes a wholesaler. The term "dealer" includes a supplier and a retailer. Thus, significance of this Explanation is that the supplier is any one who sells for the purpose of resale ; and that dealer includes both the purchaser for resale and a supplier.

It may be noted that Sections 39, 40 and 41 deal with RPM which is an important category of restrictive trade practice. Students will have recalled that Section 33 (1) (f) also makes a mention of RPM. A distinction has essentially to be made betwixt the scope of Section 33 (1)(f) and Section 39. The former makes an agreement for resale price maintenance (RPM) registrable and therefore *does not necessarily hit the validity of the agreement* as such. But the latter renders the agreement for RPM *void*. From a critical probe into these two provisions [Section 33 (1) (f) and Section 39], it would seem that in case only the maximum price is fixed and the purchaser is given the option to charge lower price on resale, the agreement would not be required to be registered under Section 33 (1)(f), nor would such an agreement attract Section 39. But Section 33 (1)(f) would still attract the registrability in respect of an agreement which merely stipulates the maximum price without *clearly stating* that prices lower than the maximum price can be charged. The Legislature, by using the words italicised above, has ruled out the possibility of lower prices being charged merely by way of implication. Prima facie it may rather sound anomalous that whereas Section 39 specifically declares an agreement for RPM as void, such an agreement would still be registerable under Section 33(1)(f). However, this anomally the legislature has resolved by so defining the word "agreement" [*vide Section 2 (a)*] as to include—(a) agreements which are enforceable at law (viz. contracts), and (b) agreements which are *not* enforceable at law (i.e. void). Therefore, it would seem that even a RPM coming within the purview of Section 39 would be covered by Section 33 (1)(f). Besides, the

opening phrase, "without prejudice to the provisions of the Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act" contained in Section 39, is intended to bring the provisions of Section 39 within the scope not only of Section 33 (1)(f) but also of the other provisions of the Act relating to restrictive trade practice.

In Section 39 (1), the words "purports to establish" have been used. The significance of these words is that a simple transaction providing for a minimum resale price cannot really be said to offend the provisions of Section 39 because there is no attempt to *establish* minimum resale prices for goods in India nor can the transaction be regarded as having provided for the *establishment* of such minimum resale prices. This view gains ground from the words employed by the legislature, namely "In so far as it [*i.e., any term or condition of contract or agreement*] purports to establish or provide for the establishment of minimum prices".

Prohibition of other measures for maintaining resale Prices : Section 40 forbids the supplier from withholding supplies on the ground that the wholesaler or retailer has not abided by, or is not likely to abide by, the resale price conditions.

Sub-section (2) provides that without prejudice to the provisions of this Act with respect to registration and to any of the powers of the Commission or of the Central Government under this Act, no supplier shall withhold supplies of any goods from any wholesaler or retailer who seeks to obtain them for resale in India on *either* of the grounds enunciated hereunder :

(a) That the wholesaler or retailer has sold in India, at a price *below* resale price, those goods which he obtained directly or indirectly from that supplier, or that the wholesaler or retailer has supplied such goods directly or indirectly to a third party who had sold these goods at a price below sale price ;

(b) That wholesaler or retailer is likely, if the goods are supplied to him, to sell them in India at a price below resale price or is likely to supply the goods directly or indirectly to a third party who would be likely to sell them at a price below the resale price.

It shall have been noticed that Section 39 renders a minimum-resale-price-maintenance agreement void and prohibits only the making of information agreements as described in Section 39 (2). It is in the very nature of all restrictive trade practices that some of the practices, e.g., refusal to sell, boycott, are designed to enforce some other restrictive trade practice. This is also true in the case of resale price maintenance. Consequently, Section 40 (1) specifically prohibits the restrictive trade practice of the supplier who desires to withhold supplies to a wholesaler or retailer on the ground that a seller is selling or is likely to sell at a price below the minimum price either directly or indirectly. Should the supplier withhold supplies to the dealer on the ground that the dealer had advertised the goods as being available at "cut prices", the provisions of Section 40 (1) would apply, because the Court has held in *Comet Radiovision Services Ltd. v. Farewell Tandbery (1971) LR 7 RP 16*, in like circumstances, that withholding of supplies on such ground would mean that the supplier is withholding supplies because he

apprehends that the goods are likely to be sold at less than the minimum price. Sub-section (2), however, protects the supplier taking recourse to "refusal" if he can prove that the person to whom the goods are sold is likely to sell-them at a price lower than the minimum resale price with the motiff of using the goods as *loss leaders* (i.e., selling of goods not for profit-making but just for a tracting to the establishment customers who are likely to purchase other goods). Sub section (2) provides thus : "Nothing contained in sub-section (1) shall render it unlawful for a supplier to withhold supplies of goods from any wholesaler or retailer or to cause or procure another supplier to do so if he has reasonable cause to believe that the wholesaler or retailer (as the case may be) has been using as loss leaders any goods of the same or similar description whether obtained from that supplier or not.

Thus whereas sub-section (1) enjoins that no supplier shall withhold sale of goods to such a dealer in order to pressurize him to follow the supplier-enforced resale price maintenance, sub-section (2) carves out an exception whereby it permits such withholding of sale by the supplier if the buyer's intention in buying the goods is to use the goods merely as loss leaders.

Explanation II to Section 40 defines loss leaders thus : "A wholesales or retailer is said to use goods as loss leaders when he resells them otherwise than in a genuine seasonal or clearance sale not for the purpose of making any profit on the resale but for the purpose of attracting to the establishment at which the goods are sold customers likely to porchase other goods or otherwise for the purpose of advertising his business.

Section 40(3) clarifies what is understood by refusal to sell. Accordingly, a supplier shall be deemed to be withholding supplies of goods from a dealer in the following circumstances :

(a) if he refuses or fails to supply those goods to the order of the dealer ;

(b) if he refuses to supply those goods to the dealer except at prices. or on prices, or on terms or conditions as to credit, discount or other matters which are less favourable than those at or on which he normally supplies those goods to other dealers carrying on business in similar circumstances ; or

(c) treats a dealer, in spite of a contract with such dealer for the supply of goods, in a manner less favourable than that in which he normally treats other dealers in respect of time or methods of delivery or other matters arising in the performance of the contract.

It may be noted that sub-section (3) clarifies that withholding means not only total withholding. but also partial withholding, i.e., not supplying all the goods ordered by the dealer, or meting out discriminatory treatment to such dealer. Sometimes, this withholding may be justified on the ground of not flooding the market the need to ration out limited supplies, reduced production on account of increased costs etc. Clauses (b) and (c) above provide discriminatory treatment relating to the terms of the contract or in the performance of it. The Commission will have to go

into the facts and circumstances of each case and determine whether the grounds for withholding are valid.

Under Section 40(4), despite the fact that the main motive of the supplier may be to withhold the supply to enforce resale price maintenance, if the supplier has any other valid ground to withhold the supply, to enforce resale price maintenance, then he cannot be guilty of "withholding the supply".

Explanation I to Section 40 defines "Re-sale price" in relation to sale of goods of any description. According to it, the expression means any price notified to the dealer or otherwise published by or on behalf of the supplier of the goods in question (whether lawfully or not) as the price or minimum price which is to be charged on, or is recommended as appropriate for a sale of that description or any price prescribed or purporting to be prescribed for that purpose by any contract or agreement between the wholesaler or retailer and any such supplier.

The aforesaid definition of "resale price" should be applicable to both Sections 39 and 40. But as compared to Section 39, Section 40 has a greater operative force ; the definition of the aforesaid expression, as contained in Section 40 may serve the purpose of legislation. It is defined not only as what is notified to the dealer as the minimum price at which goods have to be sold but also as the recommended price for resale. It may also be noted that Section 40, like Section 39, does not apply to resale of goods outside India.

Power of Commission to exempt particular classes of goods from Sections 39 and 40 : Section 41 empowers the Commission to pass an order exempting any class of goods from the operation of Sections 39 and 40. This power is exercisable when a reference is made to the Commission by the Director General or by *any other person interested.*

It seems from the expression italicised above that a supplier of goods too may make an application, even though he himself may not be producing the whole of the goods belonging to any class. In a case like this, the Commission may hear the other suppliers producing the goods of that class and come to a decision before passing a final order.

Three tests have been laid down by Section 41(1) so as to enable the Commission to satisfy itself that an order should be passed exempting any class of goods from the operation of Sections 39 and 40. All these three tests are projected towards the protection of the interests of the public as consumers or users of the goods of particular class. These are : (a) that the quality of the goods available for sale or the varities of goods so available may not substantially suffer from reduction to the detriment of the public ; or (b) that the price at which the goods are sold by retail may not increase generally and in the long run to the detriment of the public ; or (c) that the necessary aftersale service which is at present being made available does not get substantially reduced to the detriment of the public. It is the applicant who is required to prove that any one or more of these tests have been satisfied [*In re. Joint Council of India Pharmaceutical Trade—"Dugar's Law of Restrictive Trade Practices" (Taxmann) P. 565*].

It is needless to say that it would be enough if one of the three tests is satisfied. If we look back to the provisions of Section 38 (1) (b) which is one of the gateways of escapes, we would find that all these tests are combined therein.

It seems that for the purposes of any proceedings under Section 37, the Commission will have to satisfy itself not only about the fulfilment of the tests prescribed by Section 41 (1) [*which is otherwise incorporated in Section 38 (1) (b)*], but also about the tailpiece, *viz.*, the condition laid down as the further balancing condition in Section 38. But the Commission would not be required to follow the strict tests of Section 38 while passing an order exempting any class of goods from the operations of Sections 39 and 40. However, if the Director General himself makes a reference to the Commission under Section 41, it would be reasonable to assume that he would not insist upon fulfilling the conditions in regard to "presumption as to public interest" contained in Section 38. However, in the event of the reference being made to the Commission by *any other person interested*, the Director General shall be entitled to be heard in the matter. He can definitely oppose the application and insist that both the conditions laid down in Section 38 must be fulfilled.

Section 41(2) provides that on a reference under this Section in respect of goods of any class which have been the subject of proceedings before the Commission under Section 31, the Commission may treat as conclusive any evidence of fact made in those proceedings.

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FINAL COURSE (NN)

CORPORATE LAW

STUDY XV

THE M.R.T.P. ACT

This study covers :

Chapter VII—

Power to obtain information and appoint inspectors (Sections 42 to 44)

Chapter VIII—

Offences and penalties (Section 45 to 53)

Chapter IX—

Miscellaneous (Section 54 to 67)

Prescribed Reading :

M.R.T.P.—A Compendium by A.M. Chakraborti—1984 Edition (Taxmann Publication).

POWER TO OBTAIN INFORMATION AND APPOINT INSPECTORS

Power of Director to obtain information : Section 42 empowers the Director General to obtain information. He may have *"reasonable cause to believe"* that any person is a party to an agreement subject to registration under Section 35 : if he so has, he may give notice to that person (who is a party) requiring him within such time not less than 30 days, as may be specified in the notice, to notify to him whether he is a party to any such agreement and, if so, to finish to the Director General such particulars of the agreement as may be specified in the requisition [sub-section (1)].

It has been held by the House of Lords that the phrase quoted above imparts an objective test. It does not make the Director General a judge of the matter. The words are not 'if he thinks.....' but 'he has reasonable cause.....' i.e., in fact [*Redge* v. *Baldwin* (*1964*) *AC 40*]. The existence of such a reasonable ground known to the Director General is a 'must' before he can validly tender such notice ; It is for the judge to ascertain whether or not such a reasonable cause does in fact exist. The Director General can act on the information received from the credible people and the like ; but if he seeks an order from the Court, he must place his information before the Court, in order that the Court can find out whether in fact there is reasonable cause to believe [*Registrar* v. *W.H. Smith Ltd. LR 7 RP 192*].

It may be noted that the MRTP Act provides for two alternative approaches in dealing with agreements which are liable to be registered but have not been registered namely—(i) to take recourse to the penal provisions as contained in Section 48 ; or (ii) to take recourse to the supplementary provisions pertaining to registrable agreement as contained in Section 42(1) discussed above. It will have been observed that prior to the invocation of the provisions of Section 42(1) the Director General should have reasonable cause to believe that : (a) there is an agreement within the meaning of Section 2 (a) ; (b) the agreement contains one or more of the restrictive trade practices set out in Section 33(1) ; and (c) the person upon whom the notice is proposed to be served is a party to the agreement.

It may also be noted that while discussing the provisions of Section 42(1), a mention has been made of the words "particulars of the agreement". These words mean not only the names of the parties of the agreement but also the whole of the terms of the agreement inclusive of the particulars required to be furnished under Section 35. It is worth noting that Section 42(1) is limited to obtaining information relating to a registrable agreement but it cannot be invoked with a view to compel the party to register the agreement.

Under Section 42(2), the Director General may give notice to any person by whom particulars are furnished under Section 35 in respect of any agreement or to any other person being a party to the agreement requiring him to furnish to the Director General such further documents or information in his possession or control as the Director General may consider expedient for the purpose of, or in connection with, the registration of the agreement.

It may be noted that whereas Section 42(1) refers to an agreement *not filed for registration*, Section 42(2) pertains to an agreement which has been *filed for*

[illegible] under Section 42. Section 42(2) says the Director General with the [illegible] may serve notice to any person [illegible] a [illegible] particulars of a registrable agreement in pursuance of Section 36 to any party to such an agreement requiring him to furnish certain other particulars or documents for the purpose of or in connection with registration. The notice, therefore, can be issued only *before* and not *after* the fact of registration is conveyed to the person concerned.

Section 42(4) speaks of the powers which the Commission may exercise when the Director General makes an application to it stating the particulars called for under Section 42(1) or 42(2) are not furnished. Those powers are : (a) to order the person, or as the case may be, the trade association (referred to in sub-section (3) which will be dicussed later) to furnish those particulars to the Director General within such time as may be specified in the order ; or (b) to authorise the Director General to treat the particulars contained in any document or information in his possession as the particulars relating to the agreement ; or (c) to make an order, if the Commission is satisfied that the failure to furnish the particulars is *wilful*, restraining wholly or partly the parties to the agreement from acting on such agreement from making any other *agreement to the like effect*. The Commission must satisfy itself about the validity of the notice issued by the Director General before passing an order under sub-section (4) [*Registrar* v. *W.H. Smith Ltd. LR 7 RP 122*]. Further, while passing an order referred to in (c) above (i e., the third alternative) *mens rea* (i e. guilty mind) is required to be established. Once these two elements (i.e. valid issuance of the notice and *mens rea*) the Commission is satisfied about, it need not go into the question of public interest before passing such an order. Thus, the order envisaged by Section 42(4) is on a different footing from the one contemplated under Section 37(1). But Section 42(4) does not appear to empower the Commission to direct the party to file the concerned agreement for registration.

As regards the expression "agreement to the like effect" employed in the third alternative in (c) above, what is to be looked into and dicided is whether the new agreement according to the language and its terms, will seek to do or achieve the same things as those which the old agreement. if operative would have done or achieved [*In re, Black Bolt Nuts Association's Agreement LR 3 RP 43*]. This case was followed in *In re. Associated Transformer Manufacturers' Agreement (1970) LR 7 RP 203* where it was held that parties to the agreement and method of fixing prices under the new agreement not being the same as in the old agreement, the new agreement was not "to the like effect" as the new one.

Power to call for information : The Central Government is empowered by Section 43 to call upon the owner of any undertaking to furnish information by means of a general order or by means of a special order. The Central Government may call for such information as concern the activities carried on by the under taking, the connection between it and any other undertaking including such other information relating to its organisation, business, cost of production, conduct, trade practice or management, as may be prescribed. All such information is called for to enable the Central Government to carry out the purposes of this Act.

The Central Government has framed the MRTP (Information) Rules 1971 in pursuance of Section 43. These rules, since amended, enable the Central

Government to issue either a general or [illegible] given in the schedule to these rules. The Schedule [illegible] has been adopted by the MRTP Rules, 1970 as the [illegible] cation may be made under Section 26(3) for cancellation of [illegible] taking [vide rule 9A (2), MRTP Rules, 1970].

Power to appoint inspectors : Section 44 empowers the Central Government to appoint inspectors. It can exercise this power, if it is of the opinion that there are circumstances which suggest that an undertaking is indulging in any monopolistic or restrictive, or unfair, trade practice or is, in any way, trying to acquire any control over any dominant or inter-connected undertaking. For the purpose, the Central Government may appoint one or more inspectors to make an investigation into the affairs of the undertaking [sub-secton (1)]. The MRTP Act does not make provisions in respect of inspection and investigation. Therefore, Section 44(2) provides that the provisions of Sections 240 and 240A of the Companies Act, 1956 would apply in the matter of production of documents, evidence and seizure of documents by inspectors.

OFFENCES AND PENALTIES

Penalty for the contravention of Section 21 : By virtue of Section 45 (as amended by the 1984 Amendment Act), if any person contravenes the provisions of Section 21 or any order made thereunder, then he shall be punishable with imprionment for a term which may extend to 5 years, or with fine extending upto Rs. 1 lakh, or with both.

The contravention may result from : (i) the fact that an undertaking which is required to make an application under Section 21 has not made the application or (ii) the failure to comply with the conditions that may be laid down in the order passed by the Central Government under Section 21. The person may also be penalised for not securing the Central Government's approval for modification of scheme of finance as necessitated by Section 21(3)(d). But it is necessary to show that it is within the power of the owner of the undertaking to fulfil the conditions in order to succeed in the prosecution on this ground. Rules of natural justice would require that the person should be informed of the conditions subject to which proposal is likely to be approved before a breach of condition may be made the basis of a successful prosecution. The limitation provisions against prosecution as provided in Section 468(2) of the Code of Criminical Procesure would not apply.

Penalty for contravention of Section 22 or 23 or 24 or 27 : Section 46 provides that if a person contravenes the provisions of any of these Sections, he shall be punishable with imprisonment for a term extending to 5 years, or with fine extending to Rs. 1 lakh, or with both ; and where the offence is a continuing one, with a further fine extending to Rs. 1,000 for every day, after the first, during which such contravention continues.

Penalty for contravention of Section 25 : Under Section 47, if a person contravenes, without any reasonable execuse the provisions of Section 25, he shall be punishable with fine extending to Rs. 5,000, and where the offence is continuing one with a further fine extending to Rs. 500 for every day, after the first, during which such contravention continues.

[illegible]

If any person fails, without any reasonable excuse, to register an agreement which is subject to registration under this Act, he shall be punishable with imprisonment for a term extending to 2 years, or with fine extending upto Rs. 5,000, or with both ; where the offence is a continuing one, he is punishable with a further fine extending to Rs. 500 for every day, after the first, during which such failure continues [sub-section (1)].

If the owner of an undertaking (to which Part A of Chapter III applies) fails, without any reasonable excuse, to make an application under Section 26 for registration of the undertaking to which that part applies then the following consequences will ensue :

(a) *Where the undertaking is owned by a company*—(i) the company shall be punishable with fine extending to Rs. 1000 and if the offence is a continuing one, it may be punishable with a further fine extending to Rs. 50 per day ; and (ii) every officer of the company in default shall be punishable with imprisonment for a term extending to 2 years or with fine extending to Rs. 2,000, or with both, and where the offence is a continuing one, he shall be liable to a further fine extending upto Rs. 50 per day during the continuance of the contravention.

(b) *Where the undertaking is owned by a firm* every partner of that firm or where the undertaking is not owned either by a company or by a firm, every person who owns or controls the undertaking, shall be punishable with imprisonment for a term extending to 2 years or with fine extending to Rs. 2,000, or with both ; where the offence is a continuing one, such a defaulter will be punishable with a further fine upto Rs. 50 per day during the continuance of the contravention [sub-section (2)].

Penalty for contravention of order made under Section 27B or for possession of property sold to any person under Section 27B [Section 48A] : Any person or body corporate shall be punishable with imprisonment for a term which may extend 2 years and also with a fine which may extend to Rs. 10,000 in the following circumstances :

(a) If he/it, being required by any order of the Central Government mentioned in Section 27B (1) to effect disinvestment of any shares or sale of the whole or any part of any undertaking (s) by any method mentioned in that sub-section omits or fails to do so ; or

(b) If he/it, having in his/its possession, custody or control any property or assets or any part thereof which have been sold to any person (i.e. purchaser) in pursuance of an order of the Central Government

mention in Section 27B(1), wrongfully withholds such property, assets or any part thereof from such purchaser ; or

(c) If he/it, wrongfully obtains possession of any property, assets or any part thereof or retains them, which have been sold in pursuance of an order of the Central Government referred to in Section 27B(1) ; or

(d) If he/it withholds or fails to furnish to the purchaser, any documents in his/its possession, custody or control relating to the property, or any part or assets thereof, which have been sold in pursuance of the Central Government's order mentioned in Section 27B(1) ; or

(e) If he/it fails to deliver to the purchaser the property, or any part or assets thereof which have been sold in pursuance of an order of the Central Government mentioned in Section 27B (1) or any books of account, registers and other documents in his/its possession, custody, or control relating to such property, or any part or assets thereof ; or

(f) If he/it wrongfully removes or destroys properties or assets which have been sold in pursuance of an order of the Central Government referred to in Section 27B(1) ; or

(g) If he/it prefers any claim, in relation to the property, or any part or assets thereof which have been sold in pursuance of an order of the Central Government referred to in Section 27B(1), which he/it knows, or has reason to believe, to be false or grossly inaccurate.

Penalty for acquisition or transfer of shares in contravention of Section 27B, 30B, 30C, 30D or 30E [Section 48B] : Section 48B deals with penalty for contravention of the provisions of Chapter IIIA of the Act and also with contravention of any direction freezing the voting rights under Section 27B.

Any person who acquires any share in contravention of the provisions of Section 30B shall be punishable with imprisonment for a term extending to 3 years or with fine extending to Rs. 5,000, or with both, [sub-section (1)].

Every body corporate which makes any transfer of shares without giving any intimation as required by Section 30C, shall be punishable with fine extending upto Rs. 5,000. Where the contravention of Section 30C has been made by a company, every officer thereof who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine extending to Rs. 5,000 or with both [sub-section (2) (a) and (b)].

Every body corporate which makes any transfer of shares in contravention of the provisions of Section 30D shall be punishable with fine which may extend to Rs. 5,000 Where the conravention of Section 30D has been made by a company, every officer thereof who is in default shall be punishable with imprisonment for a term extending to 3 years, or with fine extending to Rs. 5,000, or with both [sub-section (2) (a) and (b)].

[illegible] by the Central Government under Section 30C, or [illegible] shares made in contravention of any direction made by the Central Government under Section 30E, or who exercises any voting right in respect of any shares in contravention of any order of Central Government referred to in Section 27B(1) or in contravention of any direction made by the Central Government under Section 30E, shall be punishable with imprisonment for a term which may extend to 3 years, and shall also be liable to fine [sub-section (4) (a)].

If a company gives effect to any voting right or other right exercised in relation to any share held in contravention of an order of the Central Government referred to in Section 27B (1) or in relation to any share acquired in contravention of the provisions of Section 30C or which gives effect to any voting right in contravention of any direction made by the Central Government under Section 30E, the company shall be punishable with fine extending to Rs. 5,000 and every officer of the company who is in default shall be punishable with imprisonment for a term extending up to 3 years, or with fine extending to Rs. 5,000, or with both [sub-section (4) (b)].

Penalty for contravention of order made by Commission relating to unfair trade practices (Section 48C) : If any person contravenes any order made by the Commission under Section 36D, he shall be punishable with imprisonment for a term extending upto 3 years, or with fine extending to Rs. 10,000, or with both.

It may be noted that the prosecution under Section 48C may include a prosecution for violation of Section 13.

Penalty for offences in relation to furnishing of Information (Section 49) : If any person fails, without any reasonable execuse, to produce any books or papers, or to furnish any information, required by the Director General under Section 11, or to furnish any notice duly given to him under Section 42, he shall be punishable with imprisonment for a term extending upto 3 months, or with fine extending upto Rs. 2,000, or with both : if the offence is a continuing one, he shall be punishable with a futher fine extending to Rs. 100 per day during such continuance [sub-sebtion (1)].

If any person, who furnishes or is required any particulars, documents or any information :—

(a) makes a statement or furnishes any document which he knows or has reason to believe to be false in any material particular, or

(b) omits to state any material fact knowing it to be material, or

(c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, he shall be punishable with imprisonment for a term extending upto 6 months, or with fine extending upto Rs. Rs. 5,000, or with both (sub-section (2)].

Penalty for offences in relation to order under the Act (Section 50) : A person who is deemed, under Section 13, to be guilty of an offence under this Act shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to Rs. 5,000, or with both ; in the event of offence being a

continuing one, he shall be punishable with a further fine extending upto Rs. [illegible] per day during the continuance of such contravention (sub-section (1)).

If a person contravenes, without any reasonable excuse, any order made by the Central Government under Section 31, or any order made by the Commission under Section 37, he shall be punishable with imprisonment for a term which shall not be less than :

(a) in the case of the first offence, six months but not more than two years ; and

(b) in the case of any second or subsequent offence in relating to the goods or services in respect of which the first offence was committed, two years but not more than five years.

In either of these two cases, if the contravention is a continuing one, he shall also be punishable with fine extending to Rs. 500 for every day during which such contravention continues. However, the Court may, if it is satisfied that the circumstances of any case so require, impose a sentence of imprisonment for a term lesser than the minimum term specified above [sub-section (2) and the proviso thereto].

If any person carries on any trade practice which is prohibited by this Act, then he shall be punishable with imprisonment for a term extending to six months, or with fine extending to Rs. 500, or with both ; where the offence is a continuing one, he shall be punishable with a further fine extending to Rs. 500 per day during which such contravention continues.

Penalty for offences in relation to resale price maintenance (*Section 51*) : If a person contravenes the provisions of Section 39 or Section 40, he shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 5300, or with both.

Penalty for wrongful disclosure of information (*Section 52*): If a person discloses an information in contravention of section 60, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs. 500, or with both.

It may be noted that where the discloure of information is required to be made in pursuance of the MRTP (Information) Rules (as inserted by the Amendment Act of 1984 with effect from 1.8.1984), there would be no penalty under Section 52 because Section 60 has made it clear that the restriction on disclosure is otherwise than in compliance with or for the purposes of the Act. There are further exceptions to the provisions for penalty for wrongful dirclosure made in Section 52; these are listed in Section 60 (2).

Penalty for contravention of any condition or restriction, etc. (*Section 52A*) : If any person contravenes, without any reasonable excuse, any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act, he shall be punishable with fine which may extend to Rs. 5,000 ; if the contraven-

[illegible] Rs. [illegible] per day during the continuance of such contravention.

Thus, any contravention of the conditions or restrictions imposed by the Central Government or the Commission would attract the provisions of Section 52A. It seems that it is in addition to the penalties provided under Sections [illegible], [illegible], 47, 48A, 48 B and 50.

Penalty for making false statement in application, returns, etc. (*Section 52B*) : An application, return report, certificate, balance sheet, prospectus, statement or other document may have to be made, submitted, furnished or produced for the purposes of any provision of the Act. If in any such document any person makes a statement which is false in any material particular, knowing it to be false or which omits to state any material fact, knowing it to be material, then he shall be punishable with imprisonment for a term extending to two years and shall also be liable to fine.

Offences by companies (*Section 53*) : Where an offence under this Act has been committed by a company, every person who at the time of the commitment of the offence, or incharge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence end shall be liable to be proceeded against and punished accordingly. However, this particular provision shall not render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence (sub-section (1) and the proviso thereto).

Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officers of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly [sub-section (2)].

The Explanation to Section 53 gives a special definition of 'company' for the purposes of prosecution. Thus, a firm or other association of individuals can be proceeded against as if it were a company. Similarly, a partner of a firm can be proceeded against as if he were a director.

MISCELLANEOUS

Power of Central Government to impose conditions, limitations and restrictions on approvals, etc. given under the Act (*Section 54*) : Under sub-section (1), the Government is empowered to impose conditions, limitations or restrictions while granting approval, sanction, permission, confirmation, or recognition or while giving any direction or issuing any order or while granting any exemption in relation to any matter coming before it for consideration.

The Central Government shall have the power to modify any scheme of

finance submitted to it under this Act in such a manner as it thinks fit [sub-section (2)].

If any condition, limitation or restriction or any terms of a scheme of finance as modified, is contravened, then the Central Government may rescind or withdraw the approval, sanction, permission, confirmation, recognition, direction, order or exemption made or granted by it (sub-section (3)].

It may be noted that the provisions of Section 54 are similar to those as contained in Section 637A of the Companies Act, 1956.

Appeals (*Section 55*) : Any person aggrieved by any decision on any question referred to in clause (a), clause (b) or clause (c) of Section 2A, or any order made by the Central Government under Chapter III or Chapter IV, or, as the case may be, the Commission under Section 13 or Section 36D or Section 37 may, within 60 days from the date of the order, prefer an appeal to the Supreme Court on one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908.

The order against which appeal may be made, as far as the Central Government's orders are concerned, relates not only to the orders as be initially passed under Chapter III or Chapter IV which are the only Chapters under which the Central Government is empowered to pass orders but also includes the order that may be passed by the Central Government under Section 54, for the orders passed under Section 54 are not independent orders emanating from the original powers vested in the Central Government under these two Chapters. Appeal is also provided against decisions under Section 2A on questions relating to "group", 'same management' and 'inter-connected undertakings'. Similarly, the other sections under which the Commission is entitled to pass orders are Sections 13, 36D and 37 referred to in this Section. There is surprisingly no reference to Section 41 under which the Commission is entitled to pass an order directing that goods of any class shall be exempt from the operation of Sections 39 and 40. It is quite possible to visualise a number of parties including those producing the same class of goods who may be aggrieved by an order of exemption granted by the Commission under Section 41. It is to be noted that no appeal is provided against orders under Section 12A or Section 12B unless such orders are found in accordance with the provisions of Section 13. Nerther is any appeal provided against orders passed under Chapter IIIA of the Act.

Jurisdiction of Courts to try offences (*Section 56*) : Only the Session Court and above shall try any offence under this Act. In other words, no Court inferior to that of a Court of Session can try any such offence.

Cognizance of offences (*Section 57*) : No Court shall take cognizance of any offence punishable under this Act, except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code, 1860.

N.B. Section 58 has been omitted by the 1984. Amendment Act with effect from 1.8 1984.

Protection regarding statements made to the Commission (Section 59) [illegible] statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statements. According to general rule, any statement or evidence given before a Court by any person can be used against him in any other proceeding by way of admission or estoppel, under certain circumstances, as provided in the Evidence Act. However, Section 59 makes an exception to this rule of evidence by giving a protection to the persons giving evidence before the Commission. However, the protection will not be available if the statement or evidence is given voluntarily or in circumstances where it is not relevant to the subject-matter of the inquiry.

Restriction on disclosure of information (*Section 60*) : No information relating to any undertaking. being an information which has been obtained by or on behalf of the Commission for the purposes of Act shall without the previous permission in writing of the owner for the time being of the undertaking, be disclosed otherwise than in compliance with or for the purposes of this Act [sub-section (1)].

Nothing contained in sub-section (1) shall apply to a disclosure of an information made for the purpose of any legal proceeding pursuant to this Act or of any criminal proceeding which may be taken, whether pursuant to this Act or otherwise, or for the purposes of any report relating to any such proceeding [sub-section (2)].

The provisions of sub-section (2) relating to disclosure of information shall not extend to the disclosure of the source of such information, except where the disclosure of such source is required by any Court, tribunal or other authority [sub-section (3)].

Power of the Central Government to require the Commission to submit a report (*Section 61*) : The Central Government may at any time require the Commission to submit to it a report on the general effect on the public interest of such trade practice as, in the opinion of that Government, either constitute or contribute to monopolistic or restrictive or unfair trade practices or concentration of economic power to the common detriment.

It may be noted that the scope of reference under Section 61 is wider than the references that may be made under Section 10 or under Section 31 or under Section 36B. However, the report submitted by the Commission will also have a general import and may not cover the specific case of any particular person or undertaking. This is also the only section which empowers the Central Government to make a reference in the matter of concentration of economic power.

Reports of the Commission to be placed before Parliament (*Section 62*) : The Central Government shall cause to be laid before both Houses of Parliament an annual report, and every report which may be submitted to it by the Commission from time to time, pertaining to the execution of the provisions of this Act.

Members, etc., to be Public servants (*Section 63*). Every member of the

Commission, the Director General, and every member of staff of the Commission, and of the Director General, shall be deemed, while acting or purporting to act in pursuance of the provisions of this Act, to be public servants within the meaning of Section 21 of the Indian Penal Code, 1860.

It may be noted that Section 63 is also relevant in the context of taking cognizance of offences under Section 57 and in the context of Section 64 dealing with action taken in good faith by the Commission and its members, officers and servants.

Protection of action taken in good faith (*Section 64*): No suit, prosecution or other legal proceedings shall lie against the Commission or any member, officer or servants of the Commission, the Director General or any member of the staff of the Director General in respect of anything which is in good faith done or intended to be done under this Act [sub-section (1)].

No suit shall be maintainable in any Civil Court against the Central Government or any officer or employee of that Government for any damage caused by anything done under, or in pursuance of any provisions of, this Act [sub-section (2)]. In other words this provision bars the maintainability of any suit in any Civil Court against the said entity. Despite this provisions a suit may be filed where it can be proved that any particular officer or employee had acted *mala fide* and from personal motives. The protection is available only when the act is done purely in discharge of official duties and without any prejudice or motivation for causing damage. Again, the protection is available in respect of an act done under or in pursuance of any provision of the act ; therefore, any act which is without jurisdiction will not give protection.

Inspection of, and extracts from, the register (*Section 65*): The register other than the special section, shall be open to public inspection during such hours and subject to such payment of fees, not exceeding Rs. 25, as may be prescribed [sub-section (1)].

Any person may upon the payment of such fee, not exceeding Re. one for every 100 words, as may be prescribed, require the Director General to supply to him a copy of. or extract from, any particulars entered or filed in the register other than the special section, certified by the Director General to be a true copy or extract [sub-section (2)].

A copy of, or extract from, any document entered or filed on the register certified under the hand of the Director General or any officer authorised to act in this behalf shall, in all legal proceedings, be admissible in evidence as of equal validity with the original [sub-section (3)].

Power to make regulations (*Section 66*): The Commission may, by notification, make regulations for the efficient performance of its functions under this Act [sub-section (1)].

In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following

[illegible] namely,—

(a) the conditions of service, as approved by the Central Government, of persons appointed by the Commission ;

(b) the issue of the processes to Government and to other persons and the manner in which they may be served ;

(c) the manner in which the special section of the register shall be maintained and the particulars to be entered or filed therein ;

(d) this clause has been deleted by the Amendment Act of 1984 and shifted instead to Section 67 as clause (ca) of sub-section (2) of that section ;

(e) the payment of costs of any proceedings before the Commission by the parties concerned and the general procedure and conduct of the business of the Commission ;

(f) any other matter for which regulations are required to be, or may be, made under this Act [sub-section (2)].

The Central Government shall cause every regulation made by the Commission to be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses of Parliament agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, then the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be—so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the regulation [sub-section (3)].

Prior to the Amendment Act of 1984 the Commission was neither required to notify the rules in the Official Gazette nor were the regulations framed by it required to be laid before both Houses of Parliament. The Amendment Act 1984 now requires the Commission to notify the regulations in the Official Gazette. By an amendment made to Section 66 by the Delegated Legislation Provisions (Amendment) Act, 1983, which came into force from March 15, 1984. The provisions of Sections 66 have now been brought at par with those of Section 67 which, it will be found later, requires the Central Government to lay before Parliament the regulations framed and notified by the Commission. The Commission had earlier framed the MRTPC Regulations, 1971 and the Restrictive Trade Practices (Enquiry) Regulations, 1970 ; these were later replaced by the MRPTC Regulations, 1974. After the coming into force of the Amendment Act, 1984, these regulations have now been amended by the MRPTC (Amendment) Regulations 1984.

Power to make rules (Section 67): It may be noted that the power under this Section is in addition to the power bestowed specifically on the Central Government by any other section of the Act. Thus, wherever the word 'prescribed' occurs in any section of the Act, the Central Government may frame rules under that Section.

The general power to frame rules is derived from sub-section (1) which states that the Central Government may by notification, make rules to carry out the purposes of this Act.

In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the form and manner in which notices may be given or applications may be made to it under this Act and the fees payable therefor ;

(aa) the form in which an application shall be made to the Central Government under Section 23 for the approval of any scheme of merger or amalgamation of an undertaking with any other undertaking;

(b) the particulars to be furnished under this Act and the form and manner in which and the intervals within which they may be furnished ;

(ba) the particulars which may be required to specified in any intimation to the Central Government with regard to transfer of shares ;

(c) the conditions of service of the members of the Commission and the Director General ;

(ca) the duties and functions of the Director General ;

(d) the places and the manner in which the register shall be maintained and the particulars to be entered therein ;

(da) the manner in which every authenticated copy of any order made by the Commission in respect of any restrictive, or unfair, trade practice shall be recorded ;

(e) the fees payable for inspection of register and for obtaining certified of particulars from the register ;

(f) the travelling and other expenses payable to persons by the Commission to appear before it ;

(g) the criterion to be adopted for determining the circumstances in which the conditions or matters enumerated in Sections 21, 23 and 25 shall be considered to exist ;

(ii) any other matter which is required to be, or may be, prescribed [sub-section (2)].

It is true that sub-section (2) mentions a few specific matters relating to which the rules may be framed by the Central Government. It may, however, be noted that the rules framed by the Central Government need nicther be confined to these specific matters nor do these clauses restrict or limit in any way the scope of the rules that may be framed by the Central Government in this behalf. The Central Government have so far framed the MRTP Rules, 1970, the MRTP (Information) Rules, 1971, the MRTP (Classification of Goods), Rules 1971 and the MRTPC (conditions of Service of Chairman and Members) Rules, 1970. In addition, the Central Government have framed the MRTPC (Recruitment of Members of Staff) Rules 1974. The MRTP Rules, 1970 and the MRTP (Information) Rules 1971 have now been amended, after the coming into force of the Amendment Act 1984, respectively by the MRTP (Amendment) Rules, 1984 and the MRTP (Information) (Amendment) Rules, 1984.

One of the important amendments made by the Amendment Act, 1984 is the bestowal of power on the Central Government to lay down the duties and functions of the Director General [referred to in clause (ca) above]. As has been mentioned earlier that this power was conferred on the Commission Section 66 .That provision has been deleted from and had been shifted to Section 67. It appears that this amendment is in line with the status of the Director General which is supposed to be independent of the Commission. The office of the Director General is a statutory office and he already enjoys certain independent powers under the provisions of the Act. He is also an appointee of the Central Government. But his functions are inseparable from certain functions of the Commission. Therefore, it is understandable that the Regulations—now framed by the Commission also gives certain powers and provides for certain duties of the Director General.

Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more successive sessions ; and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses of Parliament agree in making any modification in the rule or both House agree that the rule should not be made, then the rules shall thereafter have effect only in such modified form or be of no effect, as the case may be—so, howsoever, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule [sub-section (3)].

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FINAL COURSE (N)

Interpretation of Statutes, Deeds and Documents

This Study Covers:

- *The Context : External Circumstances.*
- *The Context : Earlier and later Act—Analogous Act.*
- *The Title-Marginal Notes—The Preamble—Statutory Instruments.*
- *Terms and General Words*
- *Subordinate Principles.*

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Interpretation of Statutes, Deeds and Documents

Introduction: The term 'interpretation' signifies expounding of the meaning of abstruse words, writings, etc., making out of the meaning, explaining, understanding in specified manner. There are some well-recognised principles that govern the interpretation of statutes. These principles aid a person in arguing, contesting and interpreting the proper significance of a section, a proviso and explanation or a schedule to an Act.

"Interpretation is usually said to be either 'legal' or 'doctrinal'. It is legal when there is an actual rule of law which binds the Judge to place a certain interpretation of the starute. It is doctrinal, when its purpose is to discover 'real' and 'true' meaning of the statute. 'Legal' interpretation is sub-divided into 'authentic' and 'usual'. It is 'authentic' when the rule of interpretation is derived from the legislator himself; it is 'usual' when it comes from some other source such as custom or case-law. Thus when Justinian ordered that all the difficulties arising out of his legislation should be referred to him for decision, he was providing for authentic interpretation, and so also was the Prussian Code, 1794, when it was laid down that Judges should report any doubt as to its meaning to a Statute Commission and abide by their ruling" (Jolowicz: Lectures on Jurisprudence, 1963 Ed. 280).

Doctrinal interpretation may be either grammatical or logical. It is grammatical when the court only applies the ordinary rules of speech for finding out the meaning of the words used in the statute. When the Court goes byond the words and tries to discover the intention of the statue in some other way, then such an interpretation is called 'logical'.

According to Fitzerald, Interpretation is of two kinds, which may be distinguished as *literal and functional. The literal interpretation is that which regards conclusively the verbal expression* of the law. It does not look beyond the *literaligis*. On the other hand, functional interpretation is that which departs from the letter of the law, and seeks elsewhere for some other and more satisfactory evidence of the true intention of the legislature. It is essential to determine with accuracy the relations which subsist between two methods.

A statute is the will of legislature. The fundamental rule of interpretation of a statute is that it should be expounded according to the intent of them that made it. In the event of the words of the statute being precise and unambiguous in themselves it is only just necessary to expound those words in their natural and ordinary sense; thus far and no further. This is because these words distinctly indicate the intention of the legislature. The purpose of interpretation is to discern this intention which is conveyed either expressly or impliedly by the language used. If the intention is expressed, then the task becomes one of the verbal construction alone. But in the absence of any intention being expressed by the statute on question to which it gives rise and yet some intention has to be, of necessity, imputed to the legislature regarding it, then the interpreter has to determine it by inference based on certain legal principle. In such a case, the interpretation has to be one, which is commensurate with public benefit. Consequently, if a statute levies a penalty without expressly mentioning the recipient of the penalty, then by implication, it goes to the oficers of the State.

"The subject of the interpretation of a statute, therefore, seems to fall under two general heads: What are the principles which govern the construction of the language of an Act of Parliament? What are those which guide the interpreter in gathering the intention on those incidental points on which the legislature is necessarily presumed to have entertained an opinion but on which it has not expressed any?"

Through the process of interpretation, the Court seeks to discern the meaning of the legislation through the medium of authoritative forms in which it is expressed.

Interpretation, as you have noticed earlier, may be either grammatical or logical. Grammatical interpretation regards exclusively the berbal expression of the law; it does not go beyond the letter of the law. Logical interpretation, however, seeks more satisfactory evidence of the true intention of the legislature.

In all ordinary cases, grammatical interpretation is the sole form allowable. The Court cannot take from or add to or modify the letter of the law. This rule is, however, subjected to exception. Firstly the letter of law is logically defective on account of ambiguity, inconsistency and incompleteness. As regards the defect of ambiguity, the Court is under a duty to travel beyond the letter of the law so as to determine from other sources the true intention of the legislature. In the case of statutory expression being defective on account of inconsistency, the Court must ascertain the spirit of the law. Secondly, if the text leads to a result which is so unreasonable that it is self-evident that the legislature could not mean what it says, the Court may resolve such impasse by inferring logically the intention of the legislature.

A statute is enforceable at law, howsoever unreasonable it may be. The duty of the judicator is to administer the law as it stands. It is not, within its jurisdiction, to see whether the law is just or unreasonable. The ascertainment of the justification or reasonableness of law being the exclusive domain of the legislature, it alone can consider alteration or modification thereof. Until it is altered or modified or amended, the Court has no choice but to enforce it as it is.

Literal Construction: The first and most elementary rule of construction is that it has to be presumed that the words and phrases of technical legislation are used in their technical meaning if they had acquired any. But if the words and phrases of technical legislation have not been used in their technical meaning, then these are to be presumed to have been used in their ordinary meaning, Secondly, it has to be presumed that the phrases and sentences have to be construed according to the rules of grammar. "It is very desirable in all cases to adhere to the words of an Act of Parliament giving to them that sense which is their natural import in the order in which they are placed". No departure from this presumption is permissible, if the language admits of no other meaning. Even if the language under consideration is susceptible of another meaning, the departure from the aforesaid presumption is also not permissible, unless adequate grounds are found either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that interpretation does not give the real intention of the legislature. In case there is nothing to modify, alter, qualify the language contained in the statute, it has to be construed in the ordinary and natural meaning of the words and sentences.

If the language is not only plain but also admits of but one meaning, there is no room for interpretation, maxim being. *absolute sententia expositore non indiget.* The meaning of this Latin maxim is that when you have plain words capable of only one interpretation, no explanation of them is required. Therefore, if the legislature enacts anything by the use of clear and unequivocal language capable of only one meaning, then it must be enforced, even though it is absurd or mischievous. The underlying principle is that the meaning and intention of a statute has to be ascertained from the plain and unambigouous expression employed therein rather than from any notions which may be entertained by the Court as to what is just and expedient. However unjust, arbitrary or *inconvenient the meaning coveyed may be, it must receive its full effect.*

But judges are not always prepared to concede as plain language that which involves absurdity and inconsistency. "In construing wills and, indeed, statutes and all written instruments the grammatical and ordinary sense of the words has to be adhered to, unless that would lead to some *absurdity*, some repugnancy or inconsistency with the rest of the instruments, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further." The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. But at the same time, there may be a choice between two interpretations—one narrower and the other wider or bolder. If the narrower interpretation would fail to achieve the manifest purpose of the legislation then you should *avoid* a construction which would reduce the legislation to futility. In such a case you should rather accept the wider or bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Omissions are not likely to be inferred. From the aforesaid general rule of literal construction springs another rule that nothing is to be added to or taken away from a statute unless there are similar adequate grounds to justify the inference that the legislature intended something which it omitted to express "It is a strong thing to read into an Act of Parliament words which are not there, and, in the absence of clear necessity, it is a wrong thing to do". If a case has not been provided for in a statute, it is not to be dealt with merely because there seems to be no good reasons why it should have been omitted, and the omission appears to be consequently unintentional.

Reasonable Corrections are not to Over-ride Plain Terms: A construction that will leave without effect any part of the language of a statute will be rejected normally. For example, if an Act plainly gave a right of appeal from one quarter sessions to another it was held that such a provision though extraordinary and perhaps an oversight, could not be eliminated.

The Context: External Circumstances: Ambiguity has to be interpreted to harmonise with intention. A thing that is within the letter of a statute will generally be interpreted as not within the statute unless it is also within the real intention of the legislature, and the words, if sufnciently flexible, must be construed in the sense which, if grammatically less correct, is more in harmony with that intention. This is an elementary rule. Alternative constructions may be equally open. In such a situation, you are to choose that alternative, which will be consistent with the smooth working of the system which a statute purports to be regulating. You must reject that alternative which will introduce uncertainty, friction or confusion into the working system. In practical life, you will find a language which is rarely so free from ambiguity as to be incapable of being used in more than one sense. If the interpreter has to adhere rigidly to its literal and primary meanings in all cases, he might be missing its real meaning in many.

Historical Setting: In the matter of the history of external circumstances which lead to the enactment, the general rule which applies to the contruction of *all other documents* equally applies to statutes. In the interpretation of statutes, the interpreter, to call to his aid all those external or historical facts which are necessary in the comprehension of the subject-matter, scope and object of an enactment, may, as regards ancient statutes, consult contemporary or other authentic works and writings, and may also consider whether a statute was intended to alter the law or leave it exactly where it stood before.

Consolidating Statutes and Previous Law: You have noticed in preambles to many an Act these words and phrases as: "An Act to consolidate previous statutes, etc., etc," In such a case, the Courts may stick to a presumption that it is not intended to alter the law and may solve doubtful points by the aid of such presumption of intention rejecting the literal construction. Even where the Act is "to amend and consolidate the law of insolvency," it would be reasonable to infer that legislature intended the law to stand.

Usage: Another class of external circumstances which has in peculiar circumstances, been sometimes taken into consideration in construing a statute consists of acts done under it, for usage may determine the meaning of the language at all events when the meaning is not free from ambiguity. When a statute uses language of doubtful import, the acting upon it for a long term of years may well give an interpretation to that obscure meaning and reduce that uncertainty to a fixed rule [Broom's Legal Maxims. 2nd Ed. p 534: *Kishore Lal Roy vs. Sharat Chundar Mazumdar, I L.R. 8C 593 (597)*]. In other words, when a legislative measure of doubtful meaning has, for several years, received an interpretation, which has generally been acted upon by the public, the Court should be very unwilling to change that interpretation, unless they see cogent reasons for doing so. This rule applies more strongly, where the measure relates not to any general principles of law, but to some technical or fiscal rule such as the registration of documents, and where the interpretation which has been put upon the measures is in the case of the general public [*Prakash Chunder Dass vs. Tarachand Dass. I L.R 9C 82 (87) (FB): Nirshi vs Sishir Kumar, 1969 S C. 864 (866)*].

The Context—Earlier and Later Acts—Analogous Act:

Act to be regarded as a whole: Passing from the external history of the statute to its contents, the elementary principle is that construction is to be made of all parts together and not of one part only. Perhaps as a general proposition, the words of a statute should be construed in accordance with the dictum of Lord Watson who says with regard to *deeds* in an unrecorded case thus: "The deed must be read as a whole in order to ascertain the true meaning of its several clauses. and the words of each clause should be so interpreted as to bring them into harmony with other provision—if that interpretation does no violence to the meaning of which they are naturally susceptible".

One of the safest guides to the construction of sweeping general words, which are difficult to apply in their full literal sense is to examine other words of like import in the same instrument and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjectd to limitations and qualifications and that such limitations and qualifications are of the same nature, that circumstance forms a strong argument for subjecting the expression in dispute to a like limitation and qualification. For example, if one section of an Act requires that "Notice" should be "giver" then a verbal notice would generally be sufficient. But, if another section provides that it should be "served" on person or "left" with him or in a particular manner or place, then it would obviously show that a written notice was intended.

Dictionary Definitions: In modern times there is a marked tendency to rely on dictionaries, although reliance thereon has been depricated. It has been held that "in the absence of any judicial guidance or authority, dictionaries can be consulted." For technical terms reference may be made to technical words.

Exposition of One Act by Language of Another: "Where there are different statutes in *pari meteria (i.e.* in an analogous case), though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other".

If two Acts are to be read together then every part of each has had to be construed as if contained in one Act. But if there is some manifest discrepancy then such a discrepancy may render it necessary to hold that the later Act had modified the earlier. However, this does not mean that every word in the later Act is to be interpreted in the same way as in the earlier Act.

Suppose; the later of the two Acts provides that the earlier Act should, so far as was consistent, be construed as one with it then an enactment in the later statute that nothing therein should include debentures was held to exclude debentures from the earlier one also.

In the event of a single Section of an Act being incorporated into another statute, it must be read in the sense which it bore in the original Act, from which it is taken. Consequently, it is but legitimate to refer to all the rest of that Act to ascertain what the Section means, though one Section only is incorporated in the new Act.

A bye-law which, for example, authorises the election of any person to be the chairman of an organisation would be construed so as to harmonise and not to conflict, with an earlier one which limited the appointment to person possessed of certain qualifications. "Any person", in this case, would be understood to mean only any eligible person.

Earlier Act Explained by Later: Not only may the later Act be construed in the light of earlier but it sometimes furnishes a legislative interpretation of the earlier, if it is in *pari materia* and if but only if the provisions of the earlier Act are ambiguous.

The mere omission in a later statute of a nagative provision contained in an earlier statue cannot by itself have the result of substantive affirmation. It is necessary to see how the law would have stood without the original proviso and the terms in which the repealed sections are re-enacted.

General rules and forms framed under an Act which enacted that they should have the same force as if they had been included in it may also be referred to for the purposes of assisting in the interpretation of the Act.

References to Repealed Act: Where a part of an Act has been repealed, it loses its operative force. Nevertheless such a repealed part of the Act may still be taken into account in construing the rest. This is because it is part of the history of the new Act. For example, if an Act, which casts a duty on race horses, cab horses and all other horses, had been specifically repealed as regards race horses, then race horses would be subsequently treated as being outside the Act; but the remaining words, cab horses, and all other horses, would obviously have included in them.

The Title—Marginal Notes—The Preamble—Statutory Instruments

Title: It is now a settled law that the title of a statute is an important part of the Act. Therefore, it may be referred to for the purpose of ascertaining its original scope as well as for the purpose of throwing light on its construction. This rule applies to the "long" title, and not to "short" title. Short title is chosen merely for convenience, its object being identification and not description. The true nature of the law is determined not by the name given to it or by its form but bt its substance. However, the title cannot override the clear meaning of the enactment. The construction of a statute is not limited by its title.

Marginal Notes, Punctuation and Illustration: The marginal note cannot control the meaning of the body of a Section, should the language thereof be clear and unambiguous. In the event of the language of the Section being clear, it may be that there has been an accidental slip in the marginal note rather than that the marginal note is correct and the accidential slip is in the body of the Section itself.

For the purpose of construing an Act, reference cannot be made to marginal notes. Illustrations to a Section are relevant and valuable in the matter of construing the text: they cannot control the Section. These are to be taken as part of the statute. They are side notes and are of some assistance since they show the drift of the Section.

"The general rule of law as to marginal notes, at any rate in public General Act of Parliament . . . is founded . . . . upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons. Where, however, the marginal notes are mentioned as already existing and established, it may well be that they do form a part of an Act of Parliament". Headings are not mere marginal notes.

Word of a Section should be preferred to anything contained in the marginal note. When a statute has been carefully *punctuated* and there is doubt about its meaning, a weight should undoubtedly be given to *punctuation*. Punctuation may have its uses in certain cases but it cannot certainly be regarded as a controlling element and it cannot be allowed to control the plain meaning of the text. Punctuation is after all a minor element in the construction of a statute [Crawford: On Statutory Construction, 343 approved in many Indian cases]. But so far as the Act of the Indian Legislature and the Constitution of India are concerned it has been held that in India, the punctuation in the statutes should not be ignored.

Illustration which are appended to a Section of an Act should be accepted if that can be done, as being relevant and valuable in construing the text. If the meaning of the enactment itself were doubtful, reference to the illustration, in order to clear the meaning would be justified. If there be any conflict between the illustration and the main enactment, the illustration must give way to the latter.

Preamble, a Guide to Intention: The preamble of a statute is a prefactory statement at its beginning. It does not override the plain provisions thereof. It is a sound means of finding out the meaning of the statute and, as it were a key to the understanding of it as well. Generally, it states the general object and intention of the legislature in passing the Act. It may be legitimately consulted for the purpose of resolving any ambiguity or for the purpose of imputing the meaning of words which may have more than one or for the purpose of keeping of effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.

Though a preamble may throw useful light as to what a statute intends to reach, it is a settled rule that the preamble cannot restrict or extend or qualify the enacting part, when the language,

the object and the scope of the Act are not open to doubt. The preamble of an amending Act cannot limit or change the plain words of the provisions of the principal Act. But if the wording of a statute gives rise to doubts as to its proper construction, e.g. where the word or a phrase has more than one meaning and it is a matter of doubt which of the two meanings is used in the Act, the preamble can and ought to be referred to in order to arrive at the proper construction to be put upon the enacting portion of the statute. A preamble can only be brought in as an aid to construction if the language of a statute is not clear.

When the preamble is found to be more extensive than the enacting part then it is equally inefficacious to control the effect of the latter, when it is otherwise free from doubt.

The preamble may now be regarded, like the title, as a part of the statute for the purpose of expaining, restricting or even extending enacting words but not for the purpose of qualifying or limiting expressed provisions couched in clear and nambiguous terms.

The preamble to an Act discloses the primary intention of the legislature. But it cannot override provisions of the Act as has been stated earlier.

Headings: The headings prefixed to a Section or a set of Sections in some modern Acts are looked upon as preambles to those Sections. They cannot control the plain words of the Act. However, they may explain ambiguous words. "While the Court is entitled to look at the heading in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such heading to give a different effect to clear words in the Section where there cannot be any doubt as to their ordinary meaning".

A heading to one group of Sections cannot be used to interpret another group of Sections.

Retrospective Effect: The general rule governing the construction of statutes and statutory rules as well, is that no statute is to have a retrospective effect beyond the time of its commencement. This is because the rule and law of Parliament is that *Nova Constitutio futuris forman debt imponere non praeteritis* (i.e, a new law ought to regulare what is to follow, not the past).

In the absence of express words or necessary intendment, it cannot be supposed that the legislature meant to deprive a man of a vested right. There is a material difference when statute is dealing with rights, already vested, not intended to be taken away and when it is dealing with mere procedure to recover those rights which it may be quite reasonable to regulate and alter. There is no vested right in procedure.

Retrospective effect cannot be given to an Act unless it is expressly provided for, because such a course would deprive vested rights and may convert acts, which were legal when they were done, into illegal acts and *vice versa*.

The legislature can enact laws that are retrospective or retroactive in effect.

Laws are construed as operating prospectively in cases and on facts which come into existence after the statutes are passed, unless a retrospective effect can clearly be contended.

Interpretation Clauses: The legislature has the power to embody in a statute itself a definition of its own language. When a word or phrase is defined as having a particular meaning in enactment, it is that meaning and that meaning alone which must be given to it in interpreting a Section of the Act unless there be anything repugnant in the contexts. The Court cannot ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it.

The purpose of a definition clause is bifold: (i) to prove a key to the proper interpretation of the enactment; and (ii) to shorten the language of the enacting part of the statute to avoid repetition of the same words contained in the definition every time the legislature wants to refer to the thing contained in the definition.

It has been a universally accepted principle that where an expression is defined in an Act, it must be taken to have, throughout the Act, the meaning assigned to it by definition, unless by doing so any repugnancy is created in the subject or context.

"Unless there is anything repugnant in the subject or context": Such a phrase is usually incorporated in modern drafting. Even if there are no such owrds, these are always to be understood and little weight is to be attributed to such an omission. Under Section 3 (42) of the General Clauses Act, the definition of the word 'person' includes any company or association or body of individuals, whether incorporated or not". The Supreme Court held that to import the definition of the "person" in the General Clauses Act into Section 4 of the Indian Partnership Act would be totally repugnant to the subject of partnership law and that the word "person" in Section 4 contemplated only natural but not artificial (i.e, legal) person. A "firm" not being "person" was not as such entitled to enter into partnership with another firm, Hindu undivided family or individual [*Dulichand Laxmi Narayan vs. Lower Income Tax, 1956* S C. 354 (358)].

"And includes": This is a phrase of extension and not a restrictive definition. It imports addition. Therefore, when in an interpretation clause it is stated that a certain term includes so and so it is implied that the term retained its ordinary meaning, whatever, it may mean. It is only an extended force and does not limit the meaning of the term to the substance of the definition.

' Means": This word indicates that the definition is a hard and fast definition and that no other meaning can be imputed to the expression than that which is put down in the definition. Thus, when the legislature uses the word "means," it signifies that the legislature wants to exhaust the significance of the term defined.

The use of the words "denotes" in contradistinction to the words "means": In such a case, the definition in the interpretation clause does not purport in the strict sense to be a definition of the particular word.

"Deemed": The word is frequently found in modern statutes for many purposes. The meaning to be attached to this word must depend on the context in which it is used. A deeming provision postulates that a thing, deemed to be something else is not in fact the thing which it is deemed to be. In other words, when a thing is deemed to be something else, it is to be treated as if it is that thing, though in fact it is not. Consequently, deeming provision creates a legal fiction. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the given circumstances. Thus, where a person is "deemed to be" something, the only meaning is that whereas, he is not in reality that something, the Act requires him to be treated as if he were. Where one thing is not the same as another thing, but the legislature says that, it shall be deemed to be same thing or where the statute enacts that something should be deemed to have been done, which in fact has not been done, it creates a legal fiction. In that case, the Court is entitled to and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

Schedule: As the schedules form a part of an Act, these must be read together with the Act *for all purpose of construction*. But the expression in the schedule cannot control or prevail over the express enactment. If there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. For example, if the provision of the Civil Procedure Code 1908, and its scheduls are in conflict then the Code must prevail.

Terms and General words:

Words Understood According to their Subject matter: When there is doubt about the meaning of the words of a statute, these should be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature had in view. Their meaning is found not so much in a strictly gramnatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used and the object to be attained.

Grammatically, they may cover it. But whenever a statute or *document* is to be construed, it must be construed not according to the more ordinary general meaning of the words but in accordance with the ordianry meaning of the words as applied to the subject-matter with regard to

which they are used. This rule applies unless there is something which renders it necessary to lead the words in a sense which is not their ordinary sense in English language as to applied. This is evident enough in the simple case of a word which has two totally different meanings.

Words Used in the Popular Sense: In dealing with the matters regarding the general public, statutes are presumed to use word in their popular sense, the Latin maxim being *utloquitur vulgus*. But to deal with particular business or transactions, words are presumed to be used with the particular meaning in which they are used and understood in the particular business in question. But that meaning is more agreeable to the object and intention. Words in statutes are frequently construed in their popular meaning and not in their technical meaning.

Beneficial Construction: It is the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even in the case where the usual meaning of language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, provided they are fairly susceptible of it. If, however, circumstances in the Act show that the phraseology is used in a larger sense than its ordinary meaning then that sense may be given to it. If the object of a statute is the public safety then its wording must be interpreted widely to give effect to that object. Thus, the legislature having intended, while passing the Workmen's Compensation Act, that every workman in the prescribed trades should be entitled to compensation, it was held that the Act ought to be construed, so far as possible, to give effect to its primary provisions. .

Statutes which require something to be done, *e.g.*, a statute which requires notice of acton for anything done, are to be construed as including an omission of an act which ought to be done as well as the commission of a wrongful act. Again, a statute that requires something to be done by a person would be complied with generally if the thing were done by another on his behalf and by his authority, for it would be presumed that there was no intention to prevent the application of the general principle of the law that *quo facit per alium facit per se (i.e..* he who acts through another is deemed to act in person), unless there was something in either the language or the object of the statute which showed that personal act was intended. This is because, where personal act is intended, the principle that *delegats non potest delegare* (delegate cannot delegate) applies. Where an Act requires that notice should be signed by certain public trustees or by their clerk, it was held that signature of their clerk who held a general authority from his employer to sign all *documents* issued from his office was not a compliance with the Act.

Exceptional Construction: (a) Common Sense: Despite the general rule that full effect must be given to every word, if no sensible meaning can be fixed to a word or phase, or if it would defeat the real object of the enactment, it should be eliminated. The words of a statute must be construed so as to give a sensible meaning to them if possible. They ought to be construed *utres magis valeat quampereat*. The meaning of this Latin maxim is that it is better for a thing to have effect than to be made void.

(b) The Conjunction "or" and "and": To carry out the intention of the legislature, it is occasionally found necessary to read the conjunction "or" and "and", one or the other.

(c) "May", "Must" and "Shall": The use of the word "shall" would not of itself make a provision of the Act mandatory. It has to be construed with reference to the context in which it is used. Thus, as against the Government the word "shall" when used in statutes, it is to be contrued as "may" unless a contrary intention is manifest. Thus, a provision in a criminal statute that the offender shall be punished as the statute prescribes, is not necessarily to be taken as against the Government to direct prosecution under the provision rather than some other applicable statutes. On the other hand, when it was enacted by Section 564, Code of Civil Procedure, 1882, that the appellate Court shall not remand a case except as provided in Section 552, a remand order in contravention of that Section was held to be illegal.

Enabling words are construed as compulsory, whenever the object of the power is to effectuate a legal right.

It is well settled that the use of the word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order therefore, to interpret the legal import of the word 'may' we have to consider various factors, *e.g.* the object and the scheme of the Act, the context of the background against which the words have been used, the purpose and advantages of the Act sought to be achieved by the use of this word and the like. It is equally well settled that where the word 'may' involves a discretion coupled with an obligation or where it confers a positive benefit to general class of subjects in an utilly Act, or where the Court advances a remedy and suppresses the mischief or where giving the word a directory significance would defeat the very object of the Act then the word 'may' should be interpreted to convey a mandatory force. Where a discretion is conferred up on a public authority coupled with an obligation, the word 'may' should be construed to mean a command. Similarly, when an order of the Government or a statute confers a power on an authority, in discharge of a public duty and though such power appears to be permissive, it is imperative that the authority should exercise that power in discharge of its duties.

The word 'may' is often read as 'shall' or 'must' when there is something in the nature of the thing to be done, which makes it the duty of the person on whom the power is conferred to exercise the power. No general rule can be laid down for deciding whethere any particular provision in a statute is mandatory, meaning thereby that non-observance thereof, involves the consequences of invalidity or only directory, *i.e.*, a discretion, non-observance of which does not entail the consequence of invalidity, whatever other consequences may occur. But in each case the Court has to decide the legislature's intent. Did the legislature intend in makding the statutory provisions that non-observance of this would entail invalidity or did it not? To decide this, we have to consider not only the actual words used, but the scheme of the statute; the intended benefit to public or what is enjoined by the provisions and the material danger to public by the contravention of the scheme. The use of expression 'shall' or 'may' is not decisive. Having regard to the context, the expression 'may' has varying significance. In some context, it is purely permissive, while in others it may confer a power and make it obligatory upon the person invested with power to exercise it as laid down.

There is no doubt that the word 'may' generally does not mean 'must' or 'shall'. But the word 'may' is capable of meaning 'must' or 'shall' in the light of the context.

When a statute uses the word 'shall', *prima facie* it is mandatory but it is sometimes not so interpreted if the context or intention otherwise demands. Thus, under certain circumstances the expression 'shall' is construed as 'may'. The term 'shall' in its ordinary singnificance, is mandatory - and the Court shall ordinarily give that interpretation to that term, unless such an interpretation leads to some absurd or inconvenient consquences or be at variance with the intent of the legislature, or to be collected from other parts of the Act. For ascertaining the real intention of the legislature, the Court may consider, *inter alia*, the nature and the design of the statute and the consequences which would flow from constructing it one way or the other, the impact of other, provisions whereby the necessity of comlying with the provisions in questions is avoided, the circumstances, namely, whether or not the statute provides for a contingency of non-compliance with the provision being visited by some penalty, the serious or trivial consequences that flow therefrom and above all whether the object of the ligislation will be defeated or furthered. Keeping the above principles in mind, the Court held that provision as to time in Section 17 (1) of the Industrial Disputes Act, 1947, was directory and not mandatory.

However, it may be noted that where a specific penalty is provided in a statute for non-compliance with the particular provision in the Act itself, no discretion is left to the Court to determine whether such provision is directory or mandatory.

The practical bearing of the distinction between a provision which is *mandatory* and one which is *directory* is that while in the former case, it must be strictly observed, in the case of the

latter it is sufficient that it is substantially complied with. An enactment in mandatory form might substantially be directory and *vice versa*. Hence, it is the substance that counts and must take precedence over mere form. If provision gives a power coupled with a duty, it is mandatory and whether it does so or not will depend on such consideration as the nature of the thing empowered to be done, the object for which it is done and the persons for whose benefit the power is to be exercised.

(d) "It shall be Lawful": It is the ordinary form when jurisdiction is given to the Court to do a particular thing, to say that it is lawful for the Court to do it and when that is said, the Court is bound to do the particular thing and it is in fact unlawful to do anything else. "By the courtesy of Parliament when dealing with Courts, the word 'lawful' is used".

The aforesaid expression is not equivocal. It is plain and unambiguous. The words contained in the said expression merely make that legal and possible, which there would otherwise be no right or authority to do. They are merely enabling words. They are used in a statute when it is intended to permit something to be done which previously could not legally be done. The above-mentioned words 'are apt words to express that power is given and *prima facie* the donee of a power may either exercise it or leave it unused; it is not accurate to say that, *prima facie*, they are equivalent to saying that the donee may do it but if the object for which the power is conferred, is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. When there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it."

The same principle will apply where the legislature uses permssive expression like as he thinks fit or at his discretion. The meaning of such words is the same whether there is or is not a duty or obligation to use the power which they confer. They are potential and never in themselves significant of any obligation.

Subordinate Principles

Effect of Usage: The best exposition of *statute* or any other *document*, it is averred, is that which it has received from contemporary authority. The two Latin maxims in this regard are: *Optima Legum interpres est consuetudo (i.e.,* the custom is the best interpreter of the law); *Contemporanea exposito est optima et fortissima in lege (i.e.,* the best way to interpret a document is to read as it would have read when made). Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive. But the meaning publicly given by the contemporary or long professional usage is presumed to be the true one, even when the language has etymologically or popularly a different meaning. If it has put a wrong meaning on unambiguous language, it is rather an oppression of those concerned than an exposition of an Act and must be corrected.

Associated Words Understood in a Commonsense: When two words or expressions are coupled together one of which generally excludes the other, it is obvious that the more general term is used in a meaning excluding the specific one. For example, though the words like cows, sheep and hosres standing alone comprehend *heifers, lambs and ponies* respectively yet they would be understood as excluding them, *if the latter words* were coupled with them.

When two or more words which are susceptible of analogous meaning are coupled together, then they are understood to be used in their congnate sense. They take, as it were, their colour from each other, i.e., the more general is restricted to a sense analogous to the less general. For example, the expression, "places of public resort" assumes a very different meaning when coupled with "roads and streets" from that which it would have if the accompanying expression was "houses". Suppose there appears an expression in a statute like this: "houses for public refreshment, resort and entertainment". In this case the last word, namely, "entertainment" is to

be understood not as theatrical or musical or other similar performance, but as entertaining contributing to bodily, not mental, gratification.

Generic Words Following More Specific Words: It is the use of a general word following but not preceding the other less general terms (*ejusdem generis*) which affords the most frequent illustration of the rule, we shall now consider. In the abstract, general words, like all others, receive their full and natural meaning though they should not be extended so as to confine matters to which they are obviously not germane. But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words it is to be read as comprehending only things of the samekind as those designated by them, unless, of course, there is something to show that a wider sense was intended, e.g., a proviso specifically excepting certain classes clearly not within the suggested genus.

Unless there is genus or category there is no room for the application of the *ejusdem generis* doctrine. The words "war, disturbance or any other cause" comprise a category of violent acts attributable to human agency.

In such circumstances, the general words are construed generally. The restricted meaning which primarily attaches to the general words is rejected, when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of legislation that the general words, in spite of the fact that they follow particular words, are nonetheless be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey.

The general principle of *ejusdem generis* applies only where the specific words are all of the same nature. When there are different generis, then the meaning of general words remains uneffected by its connection with them. Thus, where an Act made it penal to convey to a person, so as to facilitate his escape, 'any mask, dress or disguise or any latter or any other artiele or thing", it was held that the last general terms were to be understood in the primary and wide meaning and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner such as crowbar. In this case, the several particular words like "disguise" and "latter" exhaust the whole genera and the last general words must be understood, therefore, as referring to other genera.

Computation of time: The word "*month*" means the calendar month. Again when so many "clear days" or so many days "at least" are given to do an act or again "*not less than*" so many days are to intervene both the terminal days are excluded from the computation. Where a statute refers to the age of any person the common law rule usually applies that the person reaches that age on the day before his birthday [*R. vs. Clifford 1939, 27 Cr. App. R. 44*].

When a statute requires that something shall be done 'forthwith' or 'immediately' or even '*instantly*', then it would probably be understood as long as a reasonable time for doing it. If the statute requires some act to be done periodically and recurrently once in a certain space of time, e.g., the inspection of boilers of steamers once in six months, it would probably be understood to mean that not more than six months should elapse between the two acts. It would not be satisfied by dividing the years into two equal periods and doing the act once at the beginning of the first and once at the end of the second period.

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FINAL COURSE (N)

SECRETARIAL PRACTICE

STUDY I

Contents :

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Prescribed Readings 1. *A Manual of Secretarial Practice*—By S.N. Sarkar.
2. *Secretarial Practice in India — By J.C. Bahl (Tenth Edition)*

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Note : All references to the "Act" in this Study paper are to the Companies Act, 1956, as amended up to. 24.12. 77.

Introduction : The word 'Secretary' has been derived from the Latin word 'Secretarius' which signifies the notary, a scribe, etc. According to the Oxford Dictionary, the word means (i) one who is entrused with private or secret matters : a confidant ; (ii) one whose office it is to write for another, especially one who is employed to conduct correspondence, to keep records and usually to transact various other business, for another person, a society, a corporation or a public body.

A private secretary is one employed by a minister, or other high official, for the personal correspondence connected with his official position. With the passage of time, the modern secretary has become indispensable to the conduct of industry, commerce and society, and not the less because most of his work may be carried on behind the scene while others receive the public credit primarily due to him.

A good secretary always strives to conceal his employer's defects and focuses attention on his virtues. He shields him alike from the ubiquitous interviewer and the garrulous inventor who boasts a remedy for every ill. He keeps from him the things he need not know and acquaints him only with such things as he ought to know. In nutshell, he is a man of discernment, discretion and tact.

Moreover, the secretary must be discreet, diplomatic and loyal and must have courage, initiative, foresight, prudence. tact and ability to delegate and to insist upon proper delegation in others. There are four principal qualities which a proper secretary must have : humaneness, integrity, diligence and loyalty. If he is to do his work properly, he must have a real appreciation of the human problems that affect man's actions. He must have broad shoulders too ; for if things go wrong he is often a convenient person upon whom to fix the blame, whereas if things go right, he may not always receive the credit which is his due. He will generally have little time or opportunity to become a specialist, but he must nevertheless at all times unselfishly place his knowledge, advice and experience at the disposal of those who can make the best use of them for the general good of his company or organisation.

Secretarial jobs need some training and skill and a sort of mental equipment with a background of education to enable the secretary to discharge his duties or functions which are onerous and multifarious. Secretarial practice offers such a course of knowledge and practical training to mentally equip one for secretarial functions.

The subject of secretarial practice is more an art than a science, since the knowledge it imparts is that of the methods, procedures, or means to attain the techniques and the requisite skill, adaptability and personality that make one a successful secretary.

Appointment of secretaries and their duties : A secretary has been defined as "any individual possessing the prescribed qualification appointed to perform the duties which may be performed by a secretary under the Companies Act and any other administrative or ministerial duties" [Section 2 (45) as amended by the Companies (Amendment) Act, 1974].

The secretary of a company is sometimes appointed by the articles of the company. Even if he is so appointed, it is essential that the appointment should be confirmed, at the first meeting of the Board of Directors by a resolution in the following form :

"Resolved that Shri.....be and/or is hereby appointed Secretary of the company on a salary of Rs.....per month on such terms as the Board may determine from time to time."

When the appointment is made, a copy of the resolution should be forwarded to the Registrar of Companies so that he may accept the returns, under the Companies Act, certified by him.

The duties of a company secretary may be broadly classified as : (i) statutory; (ii) in relation to the directors, shareholders and the public ; and (iii) administrative.

The formost duty of a company secretary is to attend to all the statutory or legal requirements that must be complied with by a company. The Companies Act, the Income-tax Act, the Indian Stamp Act and other Acts impose several obligations on every company. As the principal officer of the company, it is his duty to satisfactorily comply with them.

The Secretary is also responsible to the directors for carrying out their policies, decisions and directions ; also to maintain a record of the proceeding of their meetings.

The Secretary is expected to generally watch the interests of shareholders. But he must not disclose the affairs of the company to any one of them individually. If any information is to be given, he should release it simultaneously to all of them. More particularly, a Secretary is required to place before the Board applications for allotment, transfer and transmission of shares. Before doing so, he must ensure that the applications are supported by proper documentary evidence and that the

interest of any one of the shareholders will not be adversely affected by any such transfer.

The Secretary also is often placed in charge of the administration of the office. In that case, it will be his duty to exercise proper supervision over the working of the office so as to ensure that maximum efficiency in administration is achieved.

Legal position of Secretary : Though the Companies Act, 1956 does not define the legal position of a company secretary, yet his position may be assessed and described from the nature of the duties he is required to discharge, pursuant to his agreement with the company and in conformity with the statute. You have already read the statutory definition of the Secretary in Section 2(45) of the Companies Act You should also note that according to Section 2(30) of the Act, the Secretary is the *officer* of the company and his legal position is determined accordingly. An officer is regarded as a salaried person who is not a clerk and who has been appointed to perform certain specific duties. Therefore, the Secretary is, in the eye of law, a salaried *person*, a servant of the company under the control and subject to the directions of the Board of Directors. Legally, the company secretary is the confidential servant of the Board, doing such work *as he is told to do* and as has been laid down by the statute. Practically, when applied to the Executive Secretary, the phrase "as he is told to do" is to be replaced by the phrase "as may be delegated to him". You will perhaps appreciate that there is world of difference between the aforesaid two phases. He has no original authority to act or to represent the company or to enter into any binding contract on its behalf. But in terms of the Code of Civil Procedure, the Secretary is the principal officer of the company and, consequently, has the authority to sign court papers and other documents for the company.

In the financial interests of the company, the functions of the Secretary should be well defined. He is appointed by the company to perform ministerial or administrative duties in consonance with the provisions of the Companies Act. To this extent, he is a sub-ordinate officer and his remuneration does not come in the calculation of overall managerial remuneration under Section 198. But where managerial powers are conferred on him to the extent of management of the whole or substantially the whole of the affairs of the company, then the Secretary, notwithstanding his designation, shall be treated as Manager within the meaning of the Companies Act. Further, where in that capacity he is also a director of the company, he shall be looked upon as a managing director. In either case, the Secretary's remuneration would, of course, come within the calculation of the managerial remuneration under Section 198.

Metaphorically, secretaries are the ears, eyes and hands, while the directors are the brains of the company. Since a company, being a *juridica persona*, has no physical existence, it can only act through human agencies, and the Board of Directors constitutes this agency. Consequently, all the powers and authorities of the company are vested in the Board of Directors. Just as the human brain dictates the functions of the others limbs of the body, so also the directors undoubtedly frame the policies for the organisation and the business of a company, its present management and future expansion. The directors, not being the servants of the company, cannot be expected to attend to the company's business at all times. Therefore, the day-to-day affairs of the company have got to be delegated to a person. Such a person is appointed as the Secretary who executes or implements the policies of the directors and who has to follow their directions. He is said to be the mouthpiece of the directors, because through him the voice of the company is communicated to the shareholders and outside world. Just as the ears, eyes and hands of a human body function in their actual dealing with the outside world at the dictates of the brains, so also the Secretary of a company carries on the day-to-day administration and management of the company under the control and guidance of the directors.

But the position of the secretary, in actual practice, may be somewhat different. An accomplished secretary acts as the brain of the company. His ability, his contacts with the commercial world and his administrative control over the whole office—all this enables the secretary to vitally influence the management. In all matters of policy and administration, the directors consult an experienced and well conversant secretary. He is bestowed with ample discretionary powers which he can exercise without intervention of the Board of Directors. The secretary *vis-a-vis* the administrative set-up of a company, is often next to the managing director.

He, as an executive head, is empowered to supervise and control the secretarial and share department or other departments and may even have the power to appoint and dismiss the staff working under him, depending upon the Board's decisions in this respect. The Board may, however, delegate to him various other powers. Such a delegation depends on the nature of the appointment and the dimension of the company. Powers of the company are vested in the Board and the secretary has the power to do only such acts as are of purely ministerial nature and as have been delegated to him by the Board.

Being the principal officer of the company, he is assigned, sometimes under the articles, the duty to affix the common seal to documents and countersign them. He is also empowered to sign court papers and documents, as we have already stated earlier, under the Code of Civil Procedure, 1908.

Liabilities under the Companies Act: The Companies (Amendment) Act, 1974 has introduced a new Section 383A whereby it is provided that every company having a paid up share capital of Rs. 25 lakhs or more shall have a whole-time secretary ; where the Board of Directors of any such company comprises only two directors neither of them can be the secretary of the company. In other words, for a company having less than Rs. 25 lakhs as its paid-up share capital the appointment of a secretary is not compulsory. And, therefore, the Act does not specify any duty for him to perform.

Any firm or body corporate holding office as a secretary of a company at the commencement of the Companies (Amendment) Act, 1974 must vacate the office as a secretary within six months form such commencment. Where any individual is holding, at the commencement of the Companies (Amendment) Act, 1974, office as the secretary of more than one company having a paid-up share capital of Rs. 25 lakhs or more he shall, within a period of six months from such commencement, exercise his option as to the company of which he intends to continue as the secretary. On and from such date he shall vacate office as a secretary in relation to all other companies.

A company may, of course, appoint a secretary even if it is not compulsory for it to appoint one. In any case, he is entrusted with various duties to perform in consonance with the provisions of the Companies Act and contravention of such provisions exposes the company and/or its officer or officers in default to penalties or even imprisonment. Under Section 5 of the Act such "officers in default" mean officers who are knowingly and wilfully guilty of the defaults in non-compliance or failure. The secretary, as one of such officers of the company under Section 2 (30), may be liable for any default on his part in respect of such duties as may be entrusted to him. Normally, liabilities of the secretary emanate from the acts of ommission or commission or from actual cases of default or negligence to comply with various statutory provisions, e. g., failure to file the annual balance sheet, profit and loss account, annual return, etc, with the Registrar, failure to make entry in the register of charges, failure to make various returns to the Registrar or file various documents or particulars, default in holding the statutory meeting or annual general meeting, default in serving due notices of and recording proper minutes of the Board meetings or of the company meetings, etc., to be a party to the issue of fraudulent prospectus.

As a delegate of the Board, he has to execute its directions and also to perform the routine work of the company.

The secretary is primarily obliged to comply with all the legal requirements prescribed by the Companies Act as well as by allied statutes. He must take necessary steps to prepare all documents in connection with the memorandum,

articles, promotion and incorporation, if he was appointed before incorporation. He would be responsible for the issue of prospectus under expert legal advice, issue and allotment of shares, making calls, holding of statutory meetings, filing of statutory report, holding of annual general meeting, arranging and conducting Board meetings, filing of returns regarding allotments, filing of annual balance sheet and profit and loss account and annual returns, preparation of agenda and minutes, declaration of dividends and allied matters, transfer and transmission of shares and further issue of shares and borrowing of money by the issue of debentures or otherwise. Moreover, he must maintain share registers, register of contracts, register of members, register of debenture-holders, register of investments, register of directors, register of agencies and the like.

Sometimes, a company secretary is the chief accounts officer of the company. He has therefore to authenticate the final accounts on its behalf. For the purpose, he is required to maintain proper accounts, have the balance sheet and profit and loss account audited and filed. Also he is required to look after the various commercial transactions associated with a trading company. Being the chief accounts officer, he is required to deal with the matters arising out of income-tax, sales-tax, etc. Various other statutory regulations like Foreign Exchange Regulation Act, Capital Issues Control Act and Acts relating to licencing and development of industries, Indian Stamp Act are to be complied with by him.

A secretary may be subjected to a variety of liabilities emanating from his contract of service with the company, e. g., obligations to the directors for faithful discharge of his duties, for carrying out their lawful directions in accordance with his agreement; obligation to exercise reasonable care and skill in discharge of his duties, so as to avoid his liability to damages for negligence; obligation to act in strict obedience to the rules and regulations laid down by the articles of the company; obligation not to disclose any confidential information or technical data or knowledge collected, held or acquired in the course of his duties; obligations not to do anything repugnant to the interest of the company; liability for wilful negligence on mis-conduct or fraud in the course of his employment.

In this context, it is worthy of note that if the secretary, while lawfully discharging his duties within the scope of his authority, incurs any personal loss or liability on account of the company, he shall be entitled to be indemnified by the company for such loss or liability.

When the company goes into liquidation, the secretary, as an officer of the company, may be held liable under Section 543 of the Act for the following, namely :—

(i) misapplication or retention of any money or property ; or
(ii) for misfeasance or breach of trust in relation to the company.

The liability of the secretary may be civil and criminal. He shall be personally liable, concurrently with the company for any wrong committed in the course of his employment. But if he proves that he acted innocently, he would be entitled to be indemnified by the company for any loss sustained by him.

In the above-mentioned paragraphs we have discussed the duties of the company secretary in general terms. Now let us consider his duties *in particular relation to different entities* :—

(a) **Duties in relation to the company :** Under this head, we shall discuss his duties *before* and *after* the incorporation of the company. *Before incorporation*, as a confidant of the promoters, the prospective secretary has the duty of assisting the solicitor engaged for incorporation, meeting and discussing with solicitors, auditors, promotors, brokers, relating to matters and formalities antecedent to the formation of the company. *After incorporation*, his duties include compliance with all the requirement's under the Companies Act, Income-tax Act, the Indian Stamp Act, Foreign Exchange Regulations Act 1973, Capital Issues Control Act and other connected statues, calling of the first Board meeting to elect chairman, to appoint bankers, solicitors, etc. approve draft agreements, etc. He has to make available various registers and books of account and other papers and to file documents, notices, statements and returns with the Registrar and to maintain records of the minutes of the various meetings and proceedings. Consequently, he has to see that all the documents, papers and statements are submitted within the prescribed time-limit, deduct Income-tax from the salary to be paid by the company to the employees, to file income-tax returns of the company, etc.

(b) **Duties in relation to the directors :** We have stated earlier that the secretary is an officer of the company under the direct control of the Board of Directors. Therefore, he is under an obligation to carry out the Board's expressed or implied instructions and to act according to the powers and authorities given to him. Looking after the management of the office falls within the purview of implied authority, whereas all matters of policy come within the ambit of his expressed authority.

As you have observed earlier, the responsibility to arrange for the Board meetings, to conduct all proceedings of directors in accordance with the articles of association, to deal with correspondance of directors, to record the deliberations and decisions of directors, to keep custody of all files, documents and records concerning the directors—all these have to be shouldered by the secretary.

In matters of major importance, the secretary may contribute to the deliberations of the Board by providing facts and figures and also by giving his views thereon. Sagacity demands a study into the personal leanings and whims of a particular director or directors in order that the chairman can conclude the board meeting successfully.

(c) Duties in relation to the share-holders and the public : He is the mouth-piece of the Board of Directors, medium of communication between the directors on the one hand and the *public* on the other. The word 'public' includes shareholders, customers, brokers, other companies, Government and public bodies, creditors and others. Being the confidant of the Board, he records its deliberations and decisions in matters concerning shareholders, and afterwards notifies them to shareholders and the public. It is incumbent on him to convene the Board meetings in obedience to its directions, to make public declarations on its behalf, to disclose the position of the company to the shareholders in pursuance of the requirements of the Act, to see that the dividend, when declared, is paid properly. Also, he has to observe the rules and issue notice as regards closing of books during the prescribed period as well as to afford inspection of documents, e.g., prospectus, statement in lieu of prospectus, any contract or document or application to the Government, etc.

It is his duty to comply with the requirements of the stock exchange regulations and thus to see that the interests of stock brokers and their clients are not unduly harmed. It is his duty to keep strictly to himself, both in the interests of the company and its members, any confidential information that he comes to possess regarding the forthcoming dividends, contracts, loans and investments, reconstruction or amalgamation of the company.

The secretary has to act within the scope of the company's business and also within the scope of his own duties. Any act done by him beyond this scope shall not bind the company ; he shall remain personally liable on that account. His position being that of an implied trustee, he is in a fiduciary relation to the company on the one hand and the shareholders on the other. Therefore, he ought not to act in a manner in which his duty and interest may conflict.

Being the servant and the authorised agent of the company, he must confine himself studiously to the matters delegated to him and others arising out of and within the regular course of the company's business. For any statutory default or negligence as an officer of the company, he remains liable to the company's members and creditors and answerable to the Registrar of Companies and the Company Law Board.

While the secretary is the servant of the Board of Directors, he is originally

the servant of the shareholders. The matters on which he is authorised to communicate either by the Board meeting or general meeting fall within the purview of his normal duties. But in case an individual shareholder calls for any information, the secretary must be cautious and careful about whether he should part with such information, in the larger interest of the shareholders and the company itself, and deal with the situation with sagacity and prudence.

(d) **Duties in relation to organisations in the office** : The powers and duties of a secretary as office organiser or an office manager depend upon the size and magnitude of the office. In the absence of a managing director or manager, the secreatary is in sole charge of the office. He is to control, supervise and co-ordinate the various departments of the office. In some cases, the secretary is also the chief accountant.

He is to look after the secretarial or share department, correspondence department, records, filing, accounts and at times labour matters also. He is the link between the staff and the management. He has to keep the staff contented, efficient and co-operative through his sense of justice, diligence, integrity and loyalty. He must appreciate the human problems that affect man's actions but without sacrificing the necessary administrative firmness since he has to check the staff's faults or irregularities. He must have confidence in the heads of departments and must not fight shy of getting their suggestions for effecting improvement or reorganisation.

(e) **Duties in relation to the Companies Act** : As he is not only the servant of the company but also a servant of Law, so to say, he must be thoroughly conversant with the implications of the provicions of law and the procedures as to the company's affairs. He must keep a careful watch over all affairs of the company, e.g., appointment of personnel, appointment of agents for sales, purchase or other matters, appointments and retirement of directors and their remuneration and also in matters of all sales and purchase, expansion programmes, etc. This watchfulness is necessary for duly complying with the provisions of the Act. He must have up-to-date knowledge of all case laws on the subject and the lacuna in the Act or the flexible provision thereof to safeguard the interests of the company in appropriate cases. But he must guard against any act which is *ultra vires* the Act or the memorandum and articles of the company.

Essential Qualities of a Company Secretary : Having regard to the duties and responsibilities of a company secretary, the qualities that he generally should possess, apart from personal qualities, may be enumerated below :—

(i) Sound general knowledge and specialised knowledge of the statutory requirements which a company must comply with.

(ii) Knowledge of theory and practice of banking, money, foreign exchange, stock exchange, and capital market.

(iii) Working knowledge of different processes of the business including that of technique of manufacture followed by the company.

(iv) Knowledge of modern office practices and procedures, ability to make 'systems analysis' of the office operations for integrating them to avoid duplication.

(v) A persuasive personality so that he is able to 'sell his ideas'. This is essential, for only then he will be able to introduce new concepts and ideas inthe organisation to which invariably there is a great deal of internal resistance. To be successful, he must also possess a great deal of tact and patience essential for convincing others as regards the advisability of introducing new methods and techniques in office administration. For example, when the system of Automatic Data Processing is proposed to be introduced, it may give rise to a series of human problems. The secretary would have to bear the brunt of that unless he is able to create a climate conductive to its acceptance.

(vi) The capacity to grasp rapidly new ideas and trends in business management essential for keeping the organisation abreast of times in this fast moving age.

(vii) The ability to build good public relations which is very essential now-a days for maintaining harmonious relations with various Governments and semi-Government bodies.

(viii) The ability to inspire confidence among shareholders and members of the staff so that they feel that their interest is being protected adequately

(ix) Knowledge of Accountancy and such cognate subjects as Inome-tex Law, Valuation and the preparation and presentation of Statistics in scientifically accurate form.

(x) Knowledge of Mercantile Law, i.e., the law relating to contract, agency, saly of goods, negotiable instruments, carriage by land, sea and air insurance, patents, copyright, trade marks, insolvency and bill of sale.

(xi) Knowledge of the law relating to the conduct, and procedures at meetings, (a) generally (c) the meetings of registered and statutory Companies.

(xii) Knowledge of general economic conditions.

Finally, when a c. mpany has extensive foreign connections, as is the case with so many companies today, the secretary will greatly increase his value to his

company if he has got the wisdom to attain such a knowledge of one or more foreign languages as well enable him to converse and correspond freely in them. The particular language or languages to be acquired will obviously depend upon circumstances.

The secretary is intimately connected with the promotion of the company. He will work in close collaboration with the promoter.

Company secretary and other executives of the same rank : The position of the company secretary is different from that of the other executives like sales manager, commercial manager, etc., though they may be holding similar status in the organisation.

The company secretary is an "officer" by virtue of Section 2 (30) of the Companies Act according to which "officer" includes any dirctor, manager or secretary or any person in accordance with whose directions or instructions the Board of Directors or some directors are accustomed to act. The position of the director is easily understood. Manager for this purpose is a person who, subject to the superin tendence, control and direction of the Board, has the management of the whole or substantsally the whole of the affairs of a company [Section 2(24)] ; therefore sales manager or commercial manager etc. is not a manager within the scope of the Companies Act since the sphere of his authority is limited to a function. The position of the company secretary is different. He is an "officer" of the company with various duties under the Act.

Section 383A of the Act provides that every company having a paid-up share capital of rupees twenty-five lakhs or more shall have a whole-time secretary and where the Board of Directors of any such company comprises only two directors, neither of them shall be the secretary of the company. This is a unique position. There is no legal compulsion to appoint any other executive including the managing director. But in case of secretary, his appointment is legally compulsory, if the company's paid-up capital is Rs. 25 lakhs or more.

Under Section 2(45), secretary means an individual possessing the prescribed qualifications. This is another major exception. In no other case, qualification is prescribed to determine the eligibility for appointment as executives. Even for appointment of one as managing director, no qualification as such is required though there are other limitations.

The Companies Act and the Income-tax Act provide that certain things must be done by the Secretary, e.g., signing of the accounts of acompany by the Secretary under Section 215 of the Companies Act ; signing of annual return in the prescribed form, certificate as to the correctness and completeness of the facts stated in the

ahntial return, further certificate in the case of the number of members of the company exceeding 50, by the secretary under Schedule V to the Companies Act; preparation and filing of certain documents, notices, statements with the Registrar of Companies; maintenance of several books and registers under the Companies Act, etc. etc. Section 2(35) (a) of the Income-tax Act defines the term "principal officer" with reference to a company as meaning, *inter alia*, the secretary. Being the principal officer, the secretary is regarded as the person responsible for paying the amounts in respect of which tax is deductible at source under Sections 191 to 206B of the Income-tax Act. He is also required to discharge all the tax-obligations of the company (e.g, advance payment of tax, filing of return of income, etc) under Income-tax Law and other taxing statutes. As regards compliance with the provisions of other Acts like the Indian Stamp Act, Commercial Establishments Acts, Factories Act, Industrial Disputes Act, Employees' State Insurance Act, Payment of Wages Act, etc., although these Acts do not state that the secretary is bound to comply with them, nevertheless he may be called upon to discharge these duties since these fall within the purview of the phrase "any other ministerial or administrative duties" appearing in Section 2 (45) of the Companies Act. The other executives mentioned above are usually not required tn discharge these functions.

The normal practice is that a communication addressed to the secretary is treated as a communication to the company. Similarly, a communication from the secretary of a company will be treated as a communication from the company unless there is notice to the contrary.

From the above discussion, it is clear that the secretary's position, so far as the Companies Act is concerned, is quite different from that of other executives in a corporate enterprise.

Functions of a promoter : An eminent Jurist has observed that "promoter is not a team of law but of business usually summarising in a single word, a number of business operations familiar to the commercial world by which a company is generally brought into existence." In other words, promoter is the person who conceives a business scheme, studies its economics, estimates the amount of physical and human resources required for its implementation, assesses the amount of finace required for its working and if he is satisfied that scheme can be worked out profitable proceeds to register a company. The functions of a promoter thus are :

(i) to discover and investigate business opportunities ;
(ii) to assemble various elements for the starting of the business ; and
(iii) to arrange for finacing the business operations.

1. **Discovery and investigation of business opportunities :** Every business originates and developes from an 'embryonic conception' which is a crystalisation of the possibilities of being started successfully under certain conditions. To start with, the promoter draws up an outline of the business idea or scheme tentatively. It may be to manufacture a new product, to expand an existing business by amalgamating two or more separate business units or to set up an agency for the distribution of goods more economically and effectively. Afterwards, he studies the commercial possibilites of the idea or scheme, investigates its commercial possibilities by mastering all the data and evidence required for determining whether it is economically and technically sound and is sufficiently profitable to pursuade businessmen to invest their money in it. For explaining the economic, technical and financial features, the scheme is usually drawn up in as minute a detail as practicable so as to show the amount of capital that would be required, the sources from which the plans and machinery would be obtained, the extent to which raw materials are available within the country, whether any material would have to be imported and whether import licences for the same would be available, the source or sources from which labour would be drawn, the amount that would be available for distribution as dividend, etc.

To carry out the investigation, the promoter may take the assistance of experts in different fields, e.g., market research specialists, stock-brokers, economists and others. The strength and viability of the scheme will depend on the care and thoroughness with which the investigation has been carried out.

2. **Assembly of business elements :** After the scheme has been drawn up and it appears to be commercially sound, the promoter proceeds to make preliminary arrangementus for the acquisition of various element for the implemention of the scheme, e.g., the material resources, the managerial ability, creating for transport, making arragements for marketing of goods, etc.

More particularly, he decides whether the company shall be managed by managing directors or a manager, negotiates with persons who are willing to accept such a responsibility and provisionally settles the terms on which they would be appointed. Usually, the promoter is interested in being appointed to manage the company on his own or jointly with others.

3. **Financing the operation :** Finally, the promoter proceeds to estimate the total capital requirements of the company and the manner in which they should be raised, i.e, what should be the capital structure of the company and how it should be underwritten.

The Secretary will have to take now onwards an active part in the affairs.

After all the foregoing arrangements have been made, the secretary or the promoter proceeds to have the memorandum, of association, the aticles of association and the prospectus prepared and arranges for their printing. It any arrangement is to be entered with the managing director, the draft thereof, is also prepared. All these documents are usually prepared with the help of experts but the promoter guides them so as to ensure that they include all the provisions necessary for the smooth working of the company. If it is necessary to make any arrangements in advanee for the purchase of land, plant or machinery or raw materials, he enters into preliminary contracts with the suppliers.

Decisions on most of the points aforementioned are taken by the promoter himself or in consultation with the proposed directors. He defrays all the preliminary expenses incurred in connection with various items enumerated above, which he subsequently claims from the company after it has come into existence.

Besides the above functions, other functions of the promoters or the secretary are (i) to appoint managing broker, brokers and auditors ; (ii) to make application to the Controller of Capital Issues, whenever necessary ; (iii) to transact negotiations with commercial banks for short-term finance and also with other financial institutions like the Industrial Bank of India, Industrial Finance Corporation, Industrial Credit and Investment Corporation of India, for long-term finance.

Registration of companies : To register a limited company, the undermentioned documents must be filed with Registrar of Companies :

(i) Memorandum of Association ; (ii) Articles of Association, if any ; (iii) the agreement if any, which the company proposes to enter into with any individual to be appointed as its managing director ; and (iv) the statutory declaration by an advocate, an attorney or a pleader entitled to appear before a High Court or a practising Chartered Accountant who has been engaged in the formation of the company or by a person named in the articles as a director, manager or secretary of the company to the effect that all the requirements of the Act and the rules framed thereunder have been duly complied with, in respect of registration and other matters precedent and incidental thereto.

The above are the only documents under Section 33 of the Act, which necessarily have to be lodged in order to secure the registration of the company. But in practice, two other documents, which have to be filed within a short time of the company's formation, are lodged at the same time. These are as follows :

(i) The notice of the situation of the registered office of the company under Section 146 within thirty days of the date of its incorporation. The reason for the lodgment of this notice is that the company's memorandum of association only states the State where it is to be situated but does not give its actual address ; and

(ii) The consent of the persons named as directors of the company, to be filed within thirty days of their appointment as directors. (It may be noted that this position does not apply to a private company unless it is a subsidiary of a public company).

Specimen :

Memorandum of Associations and other Documents

(a) Memorandum of a company limited by shares

(See Section 14)

(i) The name of the company is "The Sunkammesh Company, Limited."

(ii) The registered office of the company will he situated in Union Territory of Delhi.

(iii) The objects for which the company is established are : [Here you should set out the main objects in accordance with the nature of the business of the company and thereafter the other objects of general nature, which may be ancillary to the main objects and some others mostly common to all companies. You will do well to consult a couple of memoranda of two different companies].

(iv) The liability of the member is limited.

(v) The share capital of the company is two hundred thousands rupees, divided into two thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in performance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names.

Names, Addresses and Descriptions of Subscribers.	Numbes of shares taken by each	Witness to the Signatures
1. A. Banerjee s/o.....Merchant	100	
2. C. Deshmukh s/o.....Industrialist	25	
3. E. Footwala s/o.....	40	
4. G. High s/o.....	10	
5. I. Tackson s/o.....	50	
6. K. Lahiri s/o.....	30	
7. M. Naini s/o.....Merchant	60	
Total	315	

Dated at.....the.....day of.....19...

(b) Memorandum of a company limited by guarantee and not having a share capital.

(See Section 14)

(i) The name of the company is "The West Bengal Marine Welfare Limited."

(ii) The registered office of the company will be situate in West Bengal.

(iii) The objects for which the company is established are "The care of the ships belonging to members of the company, and doing of all such other things as are incidental or conductive to the attainment of the above object."

[You should set out here other relared objects].

(iv) The liability of the members is limited.

(v) Every member of the company undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required but not exceeding one hundred rupees.

(vi) We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of the memorandum of association.

Names, Addresses, Descriptions and Occupations of subscribers	Witness to the Signature
1. A.B. of.....	.....
2. C.D. of.....	.....
3. E.F. of.....	.....
4. G.H. of.....	.....
5. I.J. of.....	.....
6. K.L. of.....	.....
7. M.N. of.....	.....

Dated the.....day of.....19.....

FORM

(c) Consent to act as director of a company pursuant to Section 264(1)/266(1)(a).

No. of Company.....

Name of Company.....Limited.

Presented by.....

To

The Registrar of Companies.....

I/We, the undersigned, hereby testify my/our consent to act as Director/Directors of the.....Limited pursuant to Section 264(1)/266(1)(a) of the Companies Act, 1956 certify that I/we have not been disqualified to act as Director/Directors under Section 267 or 274 of the Companies Act, 1956.

Name and surname in full	Address	Description	Occupation	Date of birth and age	Nationality	Signatures

Date this.....day of.....19.....

Note :

(1) If a director signs by his agent authorised in writting, the authority must be produced before the Registrar.

(2) This from is not required to be filed :

(a) by a company not having a share capital ;

(b) by a private company ;

(c) by a company which was a private company before becoming a public company ;

(d) Where the directors or proposed directors are named in a prospectus issued by, or on behalf of, a company after the expiry of one year from the date on which the company was entitled to commence business.

(b) Declaration of compliance with the statutory requirements in application for registration of a company pursuant to Section 33 (2)

Name of Company——————————————Limited/Private Limited

Presented by——————————————————————————

I——————————————of——————————————

do solemnly and sincerely declare that I am an Advocate of the Supreme Court or of the High Court/an Attorney or a Pleader entitled to appear before the High Court/a Chartered Accountant practising in India who is engaged in the formation of a company, or a person named in the Articles as a director/Manager/Secretary of the——————————————————————Limited/Private Limited——————————And that all the requirements of the Companies Act, 1956, and the rules thereunder in respect of matters precedent to the registration of the said company and incidental thereto have been complied with. And I make this solemn Declaration conscientiously believing the same to be true.

Date..... .....Signature

Place..... .....Designation

Witness.....

Note :

The declaration need not be either stamped or verified.

(e) List of persons who have consented to be the directors of the company in pursuance of Section 266 (4)

No. of Company.....
Nominal Capital.....
Name of company.....Limited
Presented by.....

List of persons who have consented to be directors of the..... Limited filed with the Registrar pursuant to Section 266 (4) of the Companies Act. 1956 by.....of.....the applicant (a) for registration of the memorandum and articles of association of the company.

Name and Surname in full 1	Address 2	Description 3	Occupation 4	Date of birth and age 5	Nationality
1.					
2.					
3.					
4.					
5.					
6.					
7.					

Signature(s) of.....
the applicant(s).....

Dated the dap of 19

Note :

This form is not required to be filed

(a) by a company not having a share capital ;

(b) by a private company.

(f) Undertaking to take up and pay for qualification shares pursuant to Section 266 (10) (b) (iii).

No. of Company.....
Nominal Capital.....
Name of Company.....Limited,
Presented by.....

To

The Registrar of Companies,

We, the undersigned, having consented to act as director/directors of the .....Limited, do thereby undertake from the said company and pay for..... .....shares of..... each, being the number/value of the shares prescribed as the qualification shares for the office of director of the said company.

Signature(s) 1	Address 2	Description 3	Occupation 4
1.			
2.			
3.			
4.			
5.			
6.			

Dated this.....day of.....19.....

Note :

(1) If a director signs by his agent authorised in writing the authority must be produced before the Registrar.

(2) This form is not required to be filed :

(a) by a company not having a share capital.

(b) by a private company.

(g) **Certificate of Incorporation :**

I hereby certify that the..... .....Limited, is this day incorporated under the Companies Act, 1956 (1 of 1956), and that the Company is limited.

Given under my hand at New Delhi this.....day of.....One Thousand Nine Hundred and.....

Seal of the Registrar of Companies,
New Delhi.

Sd/-
Registrar of Companies

(h) Notice of situation/Change of situation of Registered office pursuant to Section 146.

No. of Company.....
Name of Company..... .....Limited/Private Limited
Presented by.....
The Registrar of Companies

.....Limited/Private Limited hereby gives you notice in accordance with Section 146 of the Companies Act, 1956 that the Registered office of the company.

situated at.....was

removed from.....to.....

on the.....day of.....19.....

Date — Signature

The.....day of.....19..... — Designation

Borrowing powers : Every trading company has an implied power to borrow. Non-trading concerns can borrow unless specially authorised to do so.

Section 293 of the Act forbids a public company as well as a private company which is a subsidiary of a public company, to borrow in excess of the aggregate of its paid-up capital and free reserves (apart from temporary loans obtained by the company from banks). This limit, however, can be relaxed by the company in a general meeting. Borrowing powers can also be further restricted, if a provision is made in this regard in the articles.

The power to borrow also implies the power to create a charge on the assets of the company or a security for the repayment of the amount borrowed.

Section 125 of the Act contains a list of charges which, whenever created by a company must be registered with the Registrar of Companies. They are :

(a) a charge for securing any issue of Debenture ;

(b) a charge on uncalled share capital of the company ;

(c) a charge on any immovable property wherever situate or any interest therein ;

(d) a charge on any book debts of the company ;

(e) a charge, not being pledge, on any movable property of the company ;

(f) a floating charge on the undertaking or any property of the company including stock-in trade ;

(g) a charge on calls made but not paid ;

(h) a charge on a ship or any share in a ship ; and

(i) a charge on a goodwill or patent or a licence under a patent, on a trade mark or on a copyright or a licence under a copyright.

A company must also maintain a register of charges and record therein the charges created on its assets (Section 143). Copies of instruments by which a charge has been created should be kept at the registered office.

A copy of every instrument or deed creating or evidencing any charge and required to be filed with the Registrar in pursuance of Section 125, 127 or 128 should be verified as follows :

If the aforesaid instrument or deed relates solely to foreign property, the copy should be verified by a certificate either under the seal of the company or under the hand of a responsible office of the company (*i.e.*, a director, manager or secretary and any other officer, or employee of the company recognised or declared by the central Government to be a responsible officer) or under the hand of some other person interested in the mortgage or charge on behalf of any person other than the company, stating that it is true copy. On the other hand, if it relates whether wholly or partially, to property situated in India, the copy should be verified by a certificate of a responsible officer of the company given under his hand in accordance with the provisions of Section 76 of the Indian Evidence Act [Rule 6 read with Rule 2 of the Companies (Central Government's (General Rules and Forms, 1956].

Register of debentures : If a company issues a series of debentures, this register must be maintained. It should contain the following particulars :

(a) The total amount secured by the whole series ;

(b) The dates of the resolutions authorising the issue of series and the date of the covering deed, if any, by which the security is created or defined.

(c) A general description of the property charged.

(d) The names, if any, of the trustees.

In addition, the company must maintain the Register of Debenture-holders. It should have an index.

The method of transferring debentures, their redemption and the appointment of Receiver are also matters of considerable interest.

Membership of the company : The essential criteria of a member, according to the definition contained is Section 41 of the Act, are ;

(1) the person must have agreed in writing to become a member of the company ;

(2) his name must have been entered in the register of members.

Register of members: The Act does not prescribe any form in which the register should be mantained. However, Section 150 contains detailed particulars in regard to a member, which should be recorded in such a register. The form in which this register is, usually, maintained is given at page no. 24.

Section 153 of the Act prescribes that the register must be kept open at least for two hours on every working day for inspection by members free of charge, and by any other person on payment of one rupee.

The register of members and the Index may even be kept at any other place within the city, town, or village in which the registered office is situated if: (a) such other place has been approved by a special resolution passed in a general meeting ; and (b) the Registrar has been given in advance a copy of the proposed resolution. Despite these, the Central Government may make rules for the preservation and destruction of these and other documents referred to in Section 163.

REGISTER OF MEMBERS

Name
Address
Occupation

Folio No.....

Date at which entered as a member
Date at which ceased to be a member

Shares Acquired								Cash Payable on Shares		Cash paid on Shares			Shares Transferred									
No. of allotment or transfer	Date of allotment or entry of transfer	No. of shares allotted or transferred	Distinctive No. of shares inclusive		No. and date of issue of certificate	Transferor's folio	Nominal value of shares acquired	Amount due and on what account (allotment or call)	Date when due	Date of payment	Cash Book folio	Amount paid	No. of transfer	Date of entry of transfer	No. of shares of transferred	Distinctive No. or shares inclusive		No. and date of issue of the certificate	Transferee's folio	Total nominal value of shares transferred	Balance of shares held	REMARKS
			From	To												From	To					
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23

Note : All entries in the Register should be authenticated by the Secretary or the person appointed by the Board to sign share certificates.

Copies of the entries in the register, if required by a member or any other person, must be supplied within 10 days after the receipt of the application, on payment of 37 P for every 100 words or part thereof.

The entries in the register of members may be rectified by the Court according to the provisions contained in Section 155.

A company may, after giving at least seven days' previous notice through advertisement in a newspaper circulating in the district in which the registered office is situated, close its Register of Members for a period or periods not exceeding on the whole 45 days in each year, but not exceed 30 days at a time.

Foreign Registers: Such registers are maintained by companies having shareholders in foreign countries at their office in those countries. Elaborate provisions exist in this regard under Section 158 of the Companies Act.

Share Certificates: It is a document of title, issued by the company, declaring that the person named therein is the owner of a specified number of shares in the capital of the company.

According to Section 84, a certificate under the common seal of the company, specifying any shares held by any members, would be the *prima facie* evidence of the member's title to such shares; but it would not be conclusive evidence of his title.

For a detailed study of this topic, students are referred to I.S.P. (N) C.L. 3.

Students are expected to be familiar with the form of share certificate, share warrants and stock certificates, as also with the form in which a record in regard to their issue should be kept in the office. For these forms, refer to pages 27-30.

Share Warrants: These are documents evidencing the title of the holders to warrants to the shares or stocks mentioned therein. They are transferable by delivey and are thus regarded as negotiable instruments. Ordinarily, holders of share warrants are not considered members of the company, unless so laid down in the articles. Also share warrants do not operate as a qualification for a director. Elaborate provisions affecting the issue of share warrants are contained in Sections 114 and 115 of the Act. *Students are advised to study them as well as I.S.P. (N) C.L. -3.*

Stock Certificates: Stock is the aggregate of fully paid-up shares legally consolidated. Stock Certificates represent parts of this consolidated amount evidenced by a certificate. The parts in respect of which certificates are issued have no relation to the normal value of the shares consolidated. Stocks, like shares, represent a part of the fully paid-up capital of the company. But they differ from shares in several ways. (See page 31)

In exercise of the powers conferred by Section 642(1) read with Section 163 (1A), the Central Government has made the following rules called the Companies (Preservation and Disposal of Records) Rules, 1966.

Destruction of Documents (Rule 2) : The documents specified in column (1) of the Schedule to these rules kept by a company under Section 163 may be destroyed after the expiration of the period indicated against them in column (2) of the same Schedule.

Preservation of Documents beyond the period prescribed (Rule 3) : Despite anything contained in these rules, the Registrar of Companies may, by order in writing, direct any company to preserve any of the documents mentioned in column (1) of the said Schedule beyond the period specified for retention in the corresponding entry in column (2) thereof.

Register of documents to be maintained (Rule 4) : A company must maintain a register in the form set out in the Apendix annexed hereto (p. 26) wherein it shall enter brief particulars of the documents destroyed and all entries made therein shall be authenticated by the Secretary or such other person as may be authorised by the Board for the purpose.

Rule 9 : A contravention of any of these rules shall be punishable with fine which may extend to Rs. 500.

THE SCHEDULE
(See Rule 2 and 3)

Name of Documents (1)	*Period* (2)
(1) Register of members commencing from the date of the registration of the company	Permanent
(2) Index of members	Permanent
(3) Register of debenture-holders	15 years after the redemption of debentures.
(4) Index of debenture-holders	15 years after the redemption of debentures.
(5) Copies of all annual returns prepared under Sections 159 and 160 and copies of all certificates and documents required to be annexed thereto under Sections 160 to 161.	8 years from the date of filing with the Registrar.

APPENDIX
(See Rule 4)

Particulars of documents destroyed	Date and mode of destruction with the initials of Secretary or other authorised person.
(1)	(2)

Counterfoil

No.....

Rs.....

The.....Co. Ltd.

Ordinary Stock

Name.....

Address.....

.....

Amount of Stock.....

.....

Date of Sealing.....

.....

Date of Despatch.....

.....

Receipt

No.....

(To be signed and returned to the Secretary of the.....

.....Co. Ltd.)

Received a Stock Certificate

No.....

for Rs.....

Ordinary Stock in the above named company.

.....

Signature of Stockholder or Broker.

Date received.....

.....

Stock Certificate

No..... ..... Rs.....

THE BATHGATE LIMITED

Ordinary Stock
(Rs. 1,00,000)

This is to certify that Mr..... of.....is the registered proprietor of Rs.....Ordinary Stock of the above-named company, subject to its Memorandum and Articles of Association.

Given under the Common Seal of the company this .....day of..... 19.....

Seal of the Company ..... } Directors

..... Directors

..... Secretary

Note No transfer of any part of this stock comprised in the certificate will be registered, or a new certificate issued until this Certificate is surrendered to the Company for cancellation.

Counterfoil

No. 1

Name : S.M.Raju

Address : 5/A Asafali Road,
New Delhi 110002

Description : Professor

For 100 Shares

Nos : 1 to 100 inclusive.

Date of Certificate.....
.....19.....

Date on which delivered.....

Register Folio : 29

SHARE CERTIFICATE
X & Co. Ltd. NEW DELHI

No. 1 Stamp

Capital Rs. 40,00,000 divided into 4,00,000 shares of Rs. 10 each.

Subscribed and Paid-up Capital : Rs. 40,00,000

This is to certify that Shri Sampat Mal Raju is the registered holder of one hundred equity shares numbered 1-100 inclusive in X & Co. Ltd., New Delhi, subject to the Memorandum and Articles of Association thereof and that the sum of Rupees 10/-(Ten) has been fully paid up on each share.

Given under the common seal of the company this..... day of .....19.....

Seal of the Company .....} Director
.....} Director
..... Secretary

N.B. : No trasfer of any of the within named shares can be registered without the production of this certificate.

Acknowledgement

No. 1

X & CO. LTD.
NEW DELHI

Received this above numbered share certificate for 100 equity shares.

S.M. Raju
Shareholder.

Date .....

Counterfoil

No.....

The.....
Company Ltd.

.....

For.....Shares.

Numbered.....to

.....inclusive

No. of Certificate.....

Issued to.....

.....

of.....

.....

Dated.....19...

Folio in Register of members.

.....

.....

SHARE WARRANT

The.....Company, Limited
(Incorporated under the Companies Act, 1956)

Share Warrant No..... Stamp.....

This is to certify that the Bearer of this Warrant is the proprietor of..... fully paid-up Shares of Rs.....each, numbered .....to..... inclusive, in The.....Company, Limited, subject to the Articles of Association of the company and other conditions of the company endorsed hereon. Given under the Common Seal of the Company, this..... day of.....

Seal of the Company

.....} Directors
.....} Directors

..... Secretary

THE.....COMPANY, LTD.

Token for fresh supply of coupons for Warrant to Bearer representing... .....shares. The Bearer of the above Warrant will receive in exchange for this token a fresh supply of coupons when all the attached coupons have fallen due for payment.

Warrant No.....
The..... Company, Ltd.
Dividend Coupon No. 1
On.....shares included in the Share Warrant numbered as above payable according to the advertisement to be issued by the C2mpany.
Rs.....

.....
Secretary

Warrant No.....
The.....Company Ltd.
Dividend Coupon No. 2
On.....shares included in the Share Warrant numbered as above payable according to the advertisement to be issued by the Company.
Rs.....

.....
Secretary

REGISTER OF SHARE WARRANTS

Date of Application	
Name of Applicant for Warrant	
No. of Share	
Distinctive Numbers (From / To)	Shares Exchanged
No. of Share Certificate Surrendered	
Folio in Register of Members	
Date Issued	
To Whom Issued	Warrants Issued
No. of Share Warrant	
Value	
Date Surrendered	
By Whom Surrendered	
No. of Warrant	Warrants Surrendered
Value	
No. of Share Certificate Issued	
Folio in Register of Members	
Remarks	

(1) Stocks cannot be issued by the company on an orginal allotment of capital.
(2) Stocks may be of varying denominations.
(3) Stocks do not have any distinctive numbers.
(4) Stocks are issued against fully paid-up shares and are transferable in any denominations. Section 94 authorises a company to convert all or any part of its paid-up shares into stocks and convert any of its stocks into shares.

A stockholder has all the privileges of a shareholder. The advantage of stockholding is that any part of the stocks can be transferred. The procedure in regard to their conversion and the effect of conversion of shares into stocks may be studied from Chapter 9 of J.C. Bahl's Secretarial Practice in India (10th Edn.)

Call on shares: For legal provisions in this regard you may refer to the discussion of the topic in I.S.P. (N). C.L.3. But in this Study Paper you should be more concerned with the procedure on making a call. The usual practice with companies is to call a meeting of the Board of Directors and pass a resolution in respect of the call specifying the amount of the call, the time and place where payable and the partly to whom it is to be paid,. A special resolution is generally passed in the following terms:

1. "Resolved that a call of Rs.————per share of the company be made upon the members of the company and that the same be made payable on or before the———day of————————at ————————Bank Ltd————————and that all calls unpaid by that date be charged interest at the rate of————per cent per annum from the date mentioned above until payment".

You must have noticed that some large companies immediately after passing the resolution making the call notify in the newspapers for the information of the public in the form appended below:

X Y Z Co. LIMITED

Call Notice

NOTICE is hereby given to the shareholders of the company that the directors, by a resolution of the Board of Directors dated the 19th March, 1978, have made the First Call of Rs. 25 per share on 3,00,000 Equity Shares of Rs. 100 each, payable on or before the 25th May, 1978, and that the shareholders are requested to remit on or before the due date the necessary amount of all money in respect of the shares held by them to the Companys' Bankers, *viz.*, Bank of India in New Delhi (Connaught Circus Branch). The Bank will accept remittances on and after the 25th April, 1978.

Notice of Call has been sent individually to all the shareholders whose names appeared in the Register of the Company on the 9th April, 1976, at their registered addresses.

Your attention is also invited to the fact that if the money is not paid by the 15th May 1978, interest at the rate of 8% per annum will be charged from the due date to the date of payment.

For X Y Z Limited,

Delhi
21st March, 1978.

Sd/—
Managing Director.

On the passing of the aforesaid resolution, the secretary has to proceed with the work connected with the call. First he should have prepared a list of all persons to whom the abovementioned notice is to be sent and the amount payable by each of them. This list is described as the "Call List". Also he has to get prepared a notice known as the "Call Notice". At the foot of the call notice is printed a receipt for the call money. The shareholder is requested to send his remittance with the call notice entire to the bankers of the company who will receive the notice and return in to him. A perforated slip is attached to the call notice. This perforated slip bears the same number as the call notice. It is to be filled in by the Bank receiving the call money, torn off from the body of the call notice and kept as a record of the money received. As the call moneys are received and the slips collected, they are passed on by the bankers to the company.

TRANSFER OF SHARES

The Companies Act contains provisions governing transfer of shares. Section 108(I) forbids a company from registering any transfer of shares unless a duly stamped and executed instrument of transfer has been lodged with the company along with the share certificate under transfer. Section 108 (1A) specifies that the instrument of transfer should be in the prescribed from and must bear the endorsement of the specified authority with date, such endorsement being obtained before the instrument is signed by or on behalf of the transferor. The instrument, bearing endorsement and otherwise complete. should be submitted to the company for registration within the period speciefid under Section 108(1A)(b) of the Companies Act. This period is two months from the date of endorsement in all cases excepting the case of shares dealt in on recognised stock exchanges where a longer period is allowed if the register of members of the company concerned closed for the first time after the endorsement on a date subsequent to the period of aforesaid two months. Sections 108A to 108D of the Campanies Act have imposed restrictions on acquisition and transfer of shares of companies covered by Part A of Chapter III of the M.R.T.P. Act, 1969 by individuals and

bodies corporate. Section 108D empowers the Central Government to direct a company not to give effect to any transfer of shares. Section 110 provides that application for the transfer can be made either by the transferor or the transferee, and where it is made by the transferor and the shares are partly paid, the company, before effecting registration or tranfer, have to give a notice of the transfer to the transferee and allow him two weeks' time to lodge "objection", if any, to the transfer.

For a detailed discussion of the provisions of the aforesaid Section, you should refer to I.S.P. (N) C.L. -3.

In this Study Paper, you should be more concerned with the procedure on registration of transfer. After the transferor and transferee have completed the instrument of tranfer in the manner referred to above, it is the duty of the transferee or his broker to deliver it to the company for registration together with the relevant share certificate or letter of allotment, if any. It may, however, be noted that this is not necessary where the right to the shares has been transmitted by operation of law. In large companies where transfers of shares are frequent, an experienced official, called the registrar, is entrusted with the task of examination of the document. He takes upon himself much of the secretary's responsibility in this regard. When a registration of transfer is presented, it is the registrar's primary duty to see that it is either accompained by the appropriate share certificates or bears the certification stamp. The surrender of the share certificates is usually provided for in the articles of the company. But whether it is so or not, it is the usual practice for the share certificate to be given up to the company. The registrar first of all casts a superficial glance at the documents and sees that there is nothing glaringly wrong with them. If the transfer instrument appears to be in order at the first glance, it is stamped with a rubber stamp called the Registration Stamp and alloted a serial number in the space provided for that purpose. An acknowledgement or kutcha receipt is then made out and given to the person presenting the documents for registration.

Specimen of the above-mentioned registration stamp and the kutcha receipt are appended below :

REGISTRATION STAMP

Date Received..... Transfer No.....
Old Certificate No..... Date Registered.....
New Certificate No.....
Tallied in Register of Members
Transferor Transferee

....
Clerk's initials.....

X Y Z LIMITED

Share Department

(Kutcha Receipt)

Date : .....

Received from Shri/Smt./Kumari.....
the undersigned Transfer Share Document and Rs.....
being Transfer Fees at 25 p. per share.

Receiving Clerk.

No. of Transfer	No. of S.Cs.	No. of Shares	Name of Transferee(s)
1	1	5	BS. Bhagat

K/R Chkd..... .....T.R. Divd.....Date of Dly. .....

N.B.—Temporary Transfer (Pucca) Receipt(s) will be ready after about a week and the same will be delivered only on production of this acknowledgment.

The share certificate and the transfer-instrument are then placed in a filing box for scrutiny of the secretary. In order that the scrutiny of the secretary or the registrar may be thorough, he should satisfy himself on the following points.

(i) That no 'stop notice' of transfer has been served upon the company through the Court by a creditor of the transferor.

(ii) That the transfer is being executed on the form prescribed by the Government.

(iii) That the name of company is correctly stated.

(iv) That the name and address of the transferor on the instrument of transfer are compared with the particulars on the share certificate and the Register of Members.

(v) That the consideration for the transfer approximates to the market value of the shares on the date on which the instrument of transfer was signed.

(vi) That the instrument of transfer is properly stamped whether the transfer is for adequate consideration or for nominal consideration out of love and affection.

(vii) That the name, address and occuption of the transferee on the instrument of transfer is written in full and is complete for postal purposes.

(viii) That the number of shares is correctly stated both in words and figures.

bodies corporate. Section 108D empowers the Central Government to direct a company not to give effect to any transfer of shares. Section 110 provides that application for the transfer can be made either by the transferor or the transferee, and where it is made by the transferor and the shares are partly paid, the company, before effecting registration or tranfer, have to give a notice of the transfer to the transferee and allow him two weeks' time to lodge "objection", if any, to the transfer.

For a detailed discussion of the provisions of the aforesaid Section, you should refer to I.S.P. (N) C.L. -3.

In this Study Paper, you should be more concerned with the procedure on registration of transfer. After the transferor and transferee have completed the instrument of tranfer in the manner referred to above, it is the duty of the transferee or his broker to deliver it to the company for registration together with the relevant share certificate or letter of allotment, if any. It may, however, be noted that this is not necessary where the right to the shares has been transmitted by operation of law. In large companies where transfers of shares are frequent, an experienced official, called the registrar, is entrusted with the task of examination of the document. He takes upon himself much of the secretary's responsibility in this regard. When a registration of transfer is presented, it is the registrar's primary duty to see that it is either accompained by the appropriate share certificates or bears the certification stamp. The surrender of the share certificates is usually provided for in the articles of the company. But whether it is so or not, it is the usual practice for the share certificate to be given up to the company. The registrar first of all casts a superficial glance at the documents and sees that there is nothing glaringly wrong with them. If the transfer instrument appears to be in order at the first glance, it is stamped with a rubber stamp called the Registration Stamp and alloted a serial number in the space provided for that purpose. An acknowledgement or kutcha receipt is then made out and given to the person presenting the documents for registration.

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Date Received.....	Transfer No.....
Old Certificate No.....	Date Registered.....
New Certificate No.....	
Tallied in Register of Members	Transferee
Transferor	
.....	....
Clerk's initials.....	

X Y Z LIMITED

Share Department

(Kutcha Receipt)

Date : .....

Received from Shri/Smt./Kumari.....
the undersigned Transfer Share Document and Rs.....
being Transfer Fees at 25 p. per share.

Receiving Clerk.

No. of Transfer	No. of S.Cs.	No. of Shares	Name of Transferee(s)
1	1	5	BS. Bhagat

K/R Chkd..... .....T.R. Divd.....Date of Dly. .....

N.B.—Temporary Transfer (Pucca) Receipt(s) will be ready after about a week and the same will be delivered only on production of this acknowledgment.

The share certificate and the transfer-instrument are then placed in a filing box for scrutiny of the secretary. In order that the scrutiny of the secretary or the registrar may be thorough, he should satisfy himself on the following points.

(i) That no 'stop notice' of transfer has been served upon the company through the Court by a creditor of the transferor.

(ii) That the transfer is being executed on the form prescribed by the Government.

(iii) That the name of company is correctly stated.

(iv) That the name and address of the transferor on the instrument of transfer are compared with the particulars on the share certificate and the Register of Members.

(v) That the consideration for the transfer approximates to the market value of the shares on the date on which the instrument of transfer was signed.

(vi) That the instrument of transfer is properly stamped whether the transfer is for adequate consideration or for nominal consideration out of love and affection.

(vii) That the name, address and occuption of the transferee on the instrument of transfer is written in full and is complete for postal purposes.

(viii) That the number of shares is correctly stated both in words and figures.

and it agrees with the number of shares represented by the share certificate. In case the share certificate is for more shares than stated in instrument of transer, whether the latter has been certified at the time of presentation and the balance receipt issued.

(ix) That the distinctive number of shares as mentioned in the transfer deed agree with those in the share certificate.

(x) That the transferor and transferee have both signed the transfer, and that the signatures are decipherable and the names given in the body of the transfer deed are in conformity therewith.

(xi) That the signature of the transferor agrees with his specimen signature with the company.

(xii) That the signatures of both the transferor and the transferee are duly attested.

(xiii) That the transfer-deed bears a Date.

Certification of transfer: It slightly differs from registration of transfer. It arises when a particular party holds one share certificate for a certain number of shares and he sells a part of his holding. In this case, the transferor or his broker presents the instrument of transfer together with the share certificate to the Secretary, or as the case may be, registrar of the company who retains the share certificate, and stamps the instrument of transfer to the effect that a share certificate pertaining to the shares has been deposited with the company. This 'certificate', which is made with the help of a rubber stamp in the left-hand corner of the instrument of transfer, is considered equivalent to a share certificate, and the shares can be transferred and paid for on the basis of the certification.

The wording of certification differs in practice. For instance, the amount of stock or the number of shares to which the definitive certificate which has been lodged relates, may or may not be specified but it is in practice accepted as sufficient indication that the relative certificate has been deposited with and is held by the company. The practice regarding the signature on certification stamp also differs widely. Sometimes, it is signed by the secretary or the registrar, but more often by an official or clerk of the company or of the registrar, who signs on behalf of the secretary or the registrar, as the case may be, without any description of his official title or position. Sometimes, the certification is merely initialled.

Section 112 of the Companies Act provides: (1) An instrument of transfer shall be deemed to be certified if it bears the words "Certificate Lodged" or words to that effect.

(2) The certification of an instrument of transfer shall be deemed to have

been validly made, if the person issuing the certificated instrument is authorised to issue such instruments on behalf of the company or the certification is signed by an officer or servant of the company or any other person authorised to certify transfers on behalf of the company. If the company has authorised any body corporate for certification purposes, then any officer or servant of that body corporate will be considered eligible for certification of transfer.

(3) The certification shall be deemed to be signed by the person whose signature appears on the instrument unless it is shown that the signature was placed neither by himself nor by any other person authorised to use the signature on behalf of the company.

Side by side with the putting of the certification stamp on the face of the instrument of transfer, the registrar will make a note of the following facts on the back of the share certificate :

(a) Date of certification.
(b) Name of the broker presenting transfer for certification.
(c) Name of transferee.
(d) Number of shares proposed to be transferred, and their distinctive numbers.
(e) Consideration paid.
(f) The number and distinctive numbers of shares in balance.

The Secretary also issues a receipt to the transferor or his broker in respect of the shares which will remain standing in the name of the transferor. This receipt is described as the "Balance-Receipt" or "Balance Ticket," and is exchangeable for a share certificate for the remaining shares.

Particulars of all certified transfers endorsed on the back of the cancelled share certificate are entered in a separate register named Register of Certified Transfers.

Later on, when transferee present the certified instrument of transfer together with stamp duty, etc., he will be issued the usual receipts as is done in the case of registration of transfer.

Transmission of Shares : Students should read the discussion of this topic from I.S.P. (N)-C.L. 3.

Meetings and Proceedings :

The main objective of a metting is to give the members or other interested persons opportunities to exercise their rights to take part in the affairs of the organisation, or take a decision for achievement of its object and management. At such a meeting, they give vent to their opinions and make decisions. Thereafter,

resolutions are passed recording that decision and it is entered in the minute book. In the circumstances, the secretary must be abreast of the law and practice of meetings.

Requirements of a valid meeting : The business at a meeting must be transacted in conformity with the rules and regulations of the particular body and the provisions of law and general practice. Otherwise, the transanction of the business will be abortive. Some of the important rules of a valid meeting are as follows :

(a) A person authorised to convene a meeting must call it.

(b) He must issue proper notice which must specify the time and venue and the business to be transacted at the meeting. The notice should also set out the resolution to be passed thereat.

(c) The notice is to be served within the prescribed time by post, messenger, advertisement or any other possible or convenient mode.

(d) The notice must be clear and unambiguous and sent to all members and concerned persons who are statutorily entitled to the notice.

(e) The quorum as prescribed by the statute or the rules and regulations of an organisation must be present ; else the meeting will not be deemed to have been duly or legally constituted.

(f) The president or chairman of the meeting must be properly appointed or elected for conducting the meeting. Such an appointment or election is, however, governed by statute, standing orders, articles or rules and regulations of the association or institution.

(g) The proceeding of the meeting and the business transacted thereat must be carried on in consonance with the standing orders, articles, bye-laws or rules governing the body or institution and the law or statute.

Various types of company meetings: These may be classified as :

(1) Meetings of Members (Shareholders).

(a) Statutory Meetings.

(b) Annual General Meetings.

(c) Extraordinary General Meetings.

(d) Meetings of different classes of share-holders.

(2) Meetings of Debentureholders.

(3) Meetings of creditors otherwise than in winding up.

(4) Meetings of Directors and their committees.

Statutory Meeting : The first meeting of the shareholders that is convened, subsequent to the issue of the certificate of the commencement of business, is

generally described as the Statutory Meeting. It is required to be held within a period of not more than six months and not less than one month from the date on which the company is entitled to commence business. The meeting, as is quite obvious, is to be held *only once in the lifetime of a public company.*—private companies are not required to hold this meeting. The purpose of this meeting is to afford an opportunity to the members to discuss the exact financial position of the company. The members are entitled to discuss thereat any matter relating to the formation of the company or arising out of the Statutory Report.

A default in holding the statutory meeting or in filing the statutory report is punishable with a fine and, in addition, the Court may order that the company be wound up, or, if it does not take such a serious view of the default, the Court may order the company to hold the statutory meeting or file the statutory report as the case may be.

In connection with the statutory report, students should also make a special note of the topics mentioned below which are discussed at pages 318 and 331 in Chapter 17 of J.C. Bahl's Secretarial Practice in India (10th Edn.) :

(i) Certification of the Statutory Report.

(ii) Filling of the Statutory Report.

Annual General Meeting : Sections 166 and 167 of the Companies Act require that the first annual general meeting of the company must be held within 18 months of its incorporation ; but it shall not be necessary to hold any annual general meeting in the years of its incorporation or in the following year. The subsequent annual general meetings must be held within six months after the expiry of every financial year, but the interval between any two such meetings must not be of more than 15 months. However, the Registrar may, for any special reason, extend the time for the holding of the meeting (not being the first) by a period not exceeding three months. The annual general meetings are required to be held during business hours on any working day either at the registered office of the company or at any other place in the same town.

If the management of the company fails to hold the meeting within the time required then the Central Government may, on the application of any member, either call or order the calling of such a meeting and issue such direction relating to its conduct as it may consider necessary. In the case of a meeting called in accordance with the directions of the Central Government, even one person may constitute the quorum, if so directed by the Central Government.

N.B. : *For further discussion on this topic, students should refer to I.S.P. (N) CL-1.*

Significance of annual general meeting: It provides a protection from the mismanagement of the companey's affairs; it equally affords opportunity to members to exercise their rights and ventilate their grievances. This is the occasion when the members can meet and have a full discussion about the balance sheet and profit and loss account, trading results of the year and future prospects. Here the shareholders get the opportunity to appoint and/or remove an undesirable director or auditor by exercising their voting rights on the relevant resolution. They can put forward their grievances and make speeches in the presence of other members, critising the activities of the management during the last preceding year under review.

Since the Board of Directors are under a statutory obligation to convene an annual general meeting, it is a formidable weapon in the hands of the shareholders not only to control the Board of Directors but also to relieve the majority of the possible oppression and mismanagement of a powerful minority.

Duties of the Secretary: (a) *Before the annual general meeting*: (*i*) The secretary has to prepare for the audit. This work includes: (1) the preparation of the statements of account up to a date not exceeding 9 months before the meeting or up to such date as provided in the articles; (2) preparation of such statements of accounts as aforesaid for subsidiaries and branches of the company; (3) keeping of all receipts and vouchers, cash books and registers and the registers of transfer complete, up-to-date and chronologically arranged; (4) preparation of a list of debtors and creditors of the company, all rents due and payable by the company and also a list of bills payable and receivable; (5) preparation of a list of dividends as considered and recommended by the Board provisionally with Income-tax deductions worked out; (6) sitting with the auditors of the company and producing before them the minute books of the Board meeting and general meetings, the register of charges, list of allotments, full accounts as to the position of debentures and also the register of share transfers, register of investments, etc.; (7) obtaining of the bank certificate as regards balance as on the last date of the financial year for its being produced before the auditors.

(ii) To prepare for the meeting: preparatory to the annual general meeting, a Board meeting is essential: (1) to consider and recommend the dividend to be declared and passed by the shareholders at the annual general meeting; (2) to get the Board' sanction to the proposal on matters to be considered and passed; (3) to sign the Directors' report prepared by the secretary; and (4) to pass a resolution for the closure of the Register of Members persuant to the provisions of the Companies Act.

(iii) To keep in readiness sufficient number of typed or cyclostyled copies of notices of the meeting, balance sheet, profit and loss account, directors' report, forms of proxy, dividend notices and dividend warrants.

(iv) To send out the notices with enclosures to the members well ahead of time so that 21 days' clear notice is given to them in pursuance of Sections 53 and 171 of the Companies act.

(v) To prepare in consultation with the Board and keep ready the agenda.

(vi) To prepare the chairman's report.

(vii) To keep ready all books and registers for being placed on the table, e.g., minute books, copies of memorandum and articles, register of directors' shareholdings, copies of notice of meeting with resolutions, copies of balance sheet and profit and loss account, signed copies of directors' report and audited accounts, list of preference and equity shareholders, all agenda papers, poll papers, etc.

(b) *Duties at the meeting*: (1) To aid and advise the chairman in all procedural matters and to supply to him all necessarry information so as to enable him to reply to shareholders' queries; (2) To read out the notice and the agenda and sometimes to announce some other special matters for information of the members; (3) To read the auditors' report and the directors' report unless these are taken as read; (4) To take down notes of the procedings in accordance with the agenda and the instruction of the directors to enable him to accurately write down the minutes; and (5) To remain vigilant and alert all the time so that no point of fact or no name of any member initiating any motion or participating in the discussion is missed out.

(c) *Duties after the meeting:* (1) To file with the Registrar within the prescribed time a copy of the resolution, if any, passed at the meeting along with the particulars and annexures as specified in Section 192; (1) to annex copy of such resolution or agreement, if any, appoved and passed by the meeting to every copy of the memorandum and articles of association; (3) To write out the minute for signature of the chairman within 30 days of the conclusion of the meeting; (4) To file with Registrar the annual return and requisite copies of the statements of account; and (5) To issue dividend warrants to members.

Extraordinary General Meeting: The exigencies of a situation may demand the transaction of business at a meeting prior to the annual general meeting. In such a situation, the Board of Directors or a member or members may call an extra-ordinary general meeting.

This power has been conferred on the Board by Regulation 48 (1) & (2) of Table A and on the member or members by Section 169 of the Companies Act. Section 169 provides that a member or members holding not less than 1/10 of the paid-up share capital of the company carrying the right to vote may require the Board to call a meeting. This can be done by depositing the requisition at the registered office of the company. The requisition must set out the matters to be

considered at the meeting. Within 21 days of such requisition, the Directors must proceed to convene the meeting. If no meeting is held within 45 days from the requisition, the requisitionists themselves may hold the meeting within 3 months from the date of the requisition.

According to Section 173 (1), (b), the business to be transacted at the extra-ordinary general meeting shall in all cases be deemed to be *special business.*

It has been held in a Madras case (A.I.R. 1951 Mad. 542) that the requisitionists may hold the extra-ordinary general meeting at a place other than the registered office of the company when the said office is not available for the purpose.

Meeting of different classes of shareholders : This category of meeting may be required to be held under certain provisions of the Companies Act. Whenever it becomes necessary to alter the rights and privileges of any class of shareholders as provided in the articles, such a meeting may be convened. Either the consent of the 3/4 ths of the class of shareholders would be required, i.e., a special resolution would be required to be passed, at a separate meeting of the holders of shares of that class before the aforesaid changes can be implemented (Section 106). There can also be a compromise with creditors, members or any class of them by virtue of Section 391 in which case the approval of the majority of 3/4ths of the members concerned, creditors or any class of them would be necessary. One should note that though a class meeting is not a general meeting, nevertheless similar rules apply to it (Section 170).

Meeting of debentureholders : This kind of meeting is convened and conducted in pursuance of the provisions of the debenture trust-deed or any other provisions made in the debentures at the time of their issue with a view to modifying and altering the terms of the issue and also with a view to modifying the security creating the charge or mortgage. Sometimes, such a meeting can be called to appoint and remove trustees for the debentureholders.

Meeting of creditors : In the case of creditors' voluntary winding up, the company or the liquidators have to call creditors' meeting from time to time to obtain their directive or sanction in a particular matter. In a creditors' meeting, otherwise than in a winding up, a company can make compromise or enter into a scheme of arrangement with the secured or unsecured creditors or both, in accordance with procedure prescribed by Sections 391 to 393.

Who is to call a meeting : *Company meetings* of all types are to be called generally by the Board though the issue of notice. An annual general meeting, after the expiry of the statutory time-limit, is to be called, in terms of Section 167, only by the Central Government. As has already been stated earlier, an extra-ordinary general meeting is to be called by the member or members in strict obedience to Section 169. The Court can, either on its own motion or on the

application of a director or member, order a meeting other than annual general meeting to be held in certain circumstances (Section 186). *A Board meeting* can be called by any director, Board of Directors, manager or secretary. *Other meetings* : (i) A class meeting may be called by requisition under Section 169 or by the Board ; (ii) Debentureholders' meeting may be called by the Board or by the secretary or by the trustees ; (iii) As has already been mentioned earlier, a creditors' meeting is to be held by the Board or persons entitled to call a company meeting ; in case of creditors' voluntary winding up, a meeting is to be called by the liquidators or the Court.

Procedures for holding meeting : These are dealt with by Sections 171 to 186 for the detailed discussion for which you should refer to F.S.P. (N) Adv. - C.L. 1. A public company or its subsidiary has got to comply with the provisions of these Sections irrespective of whether or not anything to the contrary is contained in the articles. But a purely private company need not comply with these provisions [Section 170(1)]. It thus boils down to this that a private company may have its own regulations in regard to the length of notice convening the meetings, contents of the notice, the persons to get the notice, quorum, chairman, proxy, mode of voting, poll, etc.

Notice of meeting : For holding a meeting, notice is an essential pre-requisite. It is the secretary's duty to serve it on all persons entitled to receive it. The want of a proper notice will render the meeting infructuous. However, Section 172 provides that accidental omission to serve the notice on, and not-receipt thereof by, any member shall not invalidate the meeting.

Under Section 171, 21 days' written notice must be given for calling an ordinary general meeting, extra-ordinary general meeting or an annual general meeting. However, a shorter notice may be given : (i) for an annual general meeting if all the members entitled to vote at the meeting consent to it ; and (ii) for any other meeting, if the members holding 95% of the paid-up share capital of the company entitled to vote consent to a shorter notice.

The auditors of the company, for the time being, are also entitled to the notice of the meeting.

The said notice must specify the following things, namely, (i) Nature of the meeting, i.e., whether annual or extra-ordinary ; (ii) Place, date and hour of meeting ; (iii) Business to be transacted thereat ; (iv) In the case of any special business, also the required kind of resolution intended to be passed thereat ; also an explanatory statement under section 173 which must explain to the members the reasons for and the requirements of passing the resolution and all material facts, the

interests of directors and any other managerial personnel in the resolution and their shareholdings, etc; (v) Time and place of inspection of any document, if the business pertains to the execution thereof; (vi) A footnote in prominently bold character that a member entitled to vote is also entitled to appoint a proxy and that the proxy need not be a member (Section 172); (vii) where the notice is advertised in a newspaper, a mere statement that an explanatory statement has been forwarded to each member in pursuance of Section 173.

Copies of the balance sheet and profit and loss account and directors' report have to be annexed to the said notice only in the case of an annual general meeting. A copy of the notice should also be sent to the stock exchange in the case of a "listed" company; and it must be advertised in at least one newspaper of the city in which the stock exchange is situated.

Special notice: Section 190 provides that where the provisions of the Act or the articles of the company require special notice to be given of any resolution, the intention to move the resolution must be given to the company by a member not less than 14 days before the meeting, exclusive of the day on which the notice is served or deemed to be served and the day of the meeting. Immediately on the receipt of this notice, the company shall serve on its members notice of the resolution in the same manner as it gives notice of the meeting. If, however, it is not practicable for the company to follow this procedure, it must give the notice either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than 7 days before the meeting.

The following are the matters for which a special notice is necessary, namely, (i) Appiontment of persons as auditors other than the retiring auditors or positive non-reappointment of the retiring auditors [Section 225 (1)]; (ii) Removal of a director prior to the expiry of his period of office and appointment of some other persons in his stead (Section 284); und (iii) for other purposes required by the articles.

Special Business: Section 173 deals wiih this topice. *In the case of an annual general meeting*, all business to be transacted thereat, excepting certain items, shall be deemed to be special business. These excepted items are: (i) the consideration of the accounts, balance sheet and the reports of the Board of Directors and auditors; (ii) the declaration of a dividend; (iii) the appointment of directors in the place of those retiring; and (iv) the appointment and fixing of the remuneration of the auditors. *In the case of any other meeting*, all business shall be deemed to be special.

In connection with such special business, Section 173 imposes a compulsion on the directors to specially notify the members of the precise object of the busi-

ness to be transacted. Such notification must explain all facts having a bearing on the subject and refer to the relevant provisions of the Act and the articles, in order to enable the members to arrive at a correct judgment prior to the attending of the meeting. The notification must also state exact interest or concern of the management in the projected business. It has been held in *Kalinga Tubes v. Shanti Prasad Jain* (1964) *I Camp.L.J.* 117 and affirmed by the Supreme Court that where neither the notice nor the explanatory statement disclosed material facts relating to the resolution, would be invalid and ineffective.

Agenda: It is a document which is prepared before the date of the meeting and is circulated amongst the directors or members to notify the date, time and place of the meeting as well as brief particulars of various matter which will be discussed at the meeting. This is usually prepared by the Secretary, on a consideration of several matters, which, in his opinion, are required to be considered, by such committee or Board. It is issued, however, after it has been approved by the Managing Directr or an Executive of an equal rank.

Preparation of Agenda: The preparation of agenda requires considerable care. An ideal agenda is the one which is so worded that only by altering a few words of an item to convert it into past tense, it would form the minutes. It may be, and is often drawn up on loose sheets of foolscap paper. However, it is also preferable to write in a bound book specially kept for that purpose. The order in which various items appear in the agenda is generally the order in which the business is to be transacted at the meeting. As it is customary to discuss routine matters first, such items as relate to it come first in the agenda. They are followed by important items which, it is expected, would provoke discussion among members. At the end, the item which require only to be noted by the members are listed. Such an order generally has the merit of dividing equitably the time of the meeting among various items according to their importance. It must be added, however, that the Chairman has the discretion to take up items for consideration by the meeting in the order he considers convenient for the disposal of the business. The various items listed on the agenda are numbered serially for convenience of recording minutes and for future reference.

One method of taking notes on the discussion that takes place in the meeting is to enter them on the margin of the agenda. The mothod is, however, convenient and satisfactory only where the business is purely formal and is disposed of very quickly and almost without discussion. But it is impracticable to take down notes of matters which are discussed at length in this form On this consideration, it is desirable that the secretary shoud himself either take notes in every case in a separate note book or seek the aid of a stenographer for the purpose. Each set of notes is separately filed. Such a practice is preferable as, apart from

the fact that the record so maintained is more systematic and complete, it is of great service as a source of reference, especially when the discussion at the meeting is fully recorded. This will ensure that the minutes are an authentic record of what transpired at the meeting and both the form and the phraseology of the resolutions then would be the same in which they were proposed. Another reason why it is desirable that detailed notes should be kept in a note book is that the notes may be required for purposes other than that of framing minutes. The directors may, for instance, have suggested to the secretary the way in which a particular letter considered by them should be replied. In such cases, it will be useful if a full record of the direction is kept in the note book for future reference. It is a useful practice to repare two separate sets of notes, one for the preparation of minutes and the other of matters on which the secretary is required to take action under the directions of the Board. Such a bifurcation may be made either in the note book or on the margin of the agenda or on relevant documents which form part of the agenda.

The notes to be taken : These are certain matters which much form part of the minutes, however brief they may be. These are :

(ii) The data and place of meeting ;

(ii) The name of the Chairman of the meeting and the names of the directors or members attending the meeting ; and

(iii) The names of persons whe attended the meeting, not as members but as special invitees.

In the last mentioned case, their designation indicating the capacity in which they have attended the meeting should be given. For example, when a solicitor or an accountant or the manager of a department attends a Board meeting, the fact of their attendance should be recorded.

In the minutes of the meetings of shareholders, the names of the shareholders present at the meeting are not made a part of the minutes. But a record thereof is kept in a separate register to which a reference can be made, if necessary. However, the names of the Chairman and of the directors and officers who were present at the meeting are recorded to lend the weight of their persence to the meeting.

Why are minutes kept ? : The meetings of directors of companies, members of the managing committee of a co-operative society, and partners are convened from time to time to deliberate upon problems relating to the working of businesses in which they are engaged as well as to give necessary sanctions required under the respective statutes. The Companies Act, for example, contemplates that certain powers shall be exercised by the company only under the sanction of the Board of

Directors and others shall be exercised with the prior approval of the shareholders. Likewise, under the Co-operative Societies Act, loans can be granted and investment can be made only when sanctioned by the Managing Committee. The Partnership Act also provides that certain powers, *e.g.*, starting a new line of business, admitting a new partner, raising of loan, etc., can be exercised only with the sanction of all the partners. Most of the meetings of the officials of these bodies therefore are held to obtain the sanction required by the respective statutes, and also to transact other organisational business.

The minutes of the meetings of the several bodies aforementioned, thus, provide the management of the respective business organisations with the authority to exercise certain powers. They are thus recorded as bases of action.

In order that the minutes may adequately serve the purposes for which they are kept, they should :

(i) disclose the name of the person who is authorised to take action on the decision ;

(ii) describe the power that is vested in him ; and

(iii) indicate the extent or limit of the powers (wherever possible with reference to an amount, period or quantity).

Sometimes, to avoid any misunderstanding on a decision that has been taken, minutes of important resolutions are prepared immediately and are read out to the meeting for obtaining its approval while the matter is still fresh in the minds of the members.

In order that the minutes may be a reliable guide of an action to be taken or pursued in the future, it is desirable that they should be recorded comprehensively; the original proposal should be recorded after incorporating therein all the amendments. For implementing the decision, it is also helpful if the grounds on which amendments were proposed and the arguments that were adduced in support thereof are also recorded. However, it is unnecessary to record the names of the members who had moved amendments and the grounds on which they were moved.

At times, the minutes are required to produced in a court of law as evidence in a case. They are relied upon by the Court only if they are a full and accurate record of the discussion and the decision taken. If an essential part of the discussion or decision has been left out or some important fact considered by the meeting has not been stated, it may lead the Court to infer that the particular matter was not considered by the committee at all. Incomplete minutes, thus, at times may adversely affect the interest of the company.

Who should record the minutes ? : It is normally the duty of the secretary of

the company to record the minutes for he, according to the law as well as general practice, attends the meetings of the Board of Directors and the shareholders. The same is the position in the case of a secretary of a co-operative society. It is expected that he would take notes of their proceedings and afterwards prepare minutes therefrom. After they have been approved by the Chairman, the minutes of the Board of Directors and those of sub-committees of the Board of Directors are circulated amongst the members, inviting their comments thereon and are adopted at the next following meetings either with or without any modification. The minutes of the meetings of shareholders are recorded after they have been approved by the Chairman of the meeting. In token of the approval, the Chairman signs the minutes. Thereafter, they become part of the record of the company.

Note taking : In order that the secretary may be able to prepare accurate and complete minutes of the proceedings, it is necessary for him to take detailed notes of the proceedings. The notes are usually more extensive than what actually find place in the minutes. This is because it is not possible for the secretary to decide, while the meeting is in progress, which part of the discussion or decision is relevant or redundant to form or not to form a part of the minutes. Such a decision is taken subsequently. Therefore, a detailed preparatory report of all that transpires at the meeting is essential. In fact, the notes are a brief summary of the entire proceedings of the meeting. However, they do not contain matters which are considered *ipso facto* unimportant in the preparation of minutes.

Minute Book : The minutes book is a statutory book which every company must maintain. Elaborate provisions which are mandatory and not recommendatory in character as regards the manner in which the minutes should be recorded in the minute book are contained in Section 193 of the Companies Act. They are :

(i) The minutes of the Board of Directors and shareholders meeting must be prepared within 30 days of the conclusion of each such meeting.

(ii) Each page of every Minute Book must be initialled or signed and the last page thereof must be dated and signed

(a) in the case of a meeting of the Board or of a committee thereof, by the Chairman of the same meeting or the Chairman of the next succeeding meeting, and (b) in case of general meeting, by the Chairman of the same meeting, or in case of his death or inability, by a director duly authorised by the Board for the purpose.

(iii) The pages of the Minute Book must be consecutively numbered.

(iv) The minutes must not be pasted but written in hand.

(v) The minutes must contain a fair and correct summary of the proceedings of the meeting, more particularly they should specify appointment of officers made thereat.

(vi) In the case of the meetings of the Board or of its committees, the names of the directors present and those dissenting on a particular resolution should be recorded.

(vii) The Chirman of the meeting is authorised to expunge from the minutes matters which are considered defamatory, irrelevant, immaterial or deterimental to the interest of the company.

The minutes of the meeting kept in the aforementioned manner are an evidence of the proceedings thereat (Section 194). Therefore, until the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings thereat to have been duly taken. In particular, all appointments of directors or liquidators made at the meeting shall be valid (Section 195).

On account of the importance of the minutes as basis for settling disputes among shareholders, or groups of shareholders, the Act further provides under Section 196 that the minutes of the proceedings of general meetings should be kept at the Registered Office of the company and should be open for inspection by any member at least for two hours every day. Also a member, on receipt of the request and payment of the prescribed fee, must be furnished, within seven days, with a copy of the minutes.

In case an inspection of the minutes is refused or a copy is not provided within the prescribed time-limit, the officer of the company who is at fault shall be punishable with fine which may extend to Rs. 500 for each offence.

Writing of Minutes: Although minutes are intended to be a permanent record during the time of a company, they are meant only to be a brief record. This implies that they should not be long winded ; while writing them, all superfluities should be avoided. Minutes should not take the form of a narrative or a historical account of the proceedings of the meeting. On this account, they are unilke a newspaper report or a report of the meeting which the secretary would send to an absent director, as regards what had happened at the meeting. This is because they are a record whose meaning is to be ascertained by reference to the agenda and other connected papers which were placed before the directors when they took the decision. They are more analogous to a telegram than to a letter, to a precis than to a narrative.

Confirmation of Minutes: The procedure that is generally followed as regards confirmation of minutes has been stated already in this Study Paper. But while doing so, the function and the scope of the confirmatory process have not been considered.

The minutes of the meetings are confirmed to ensure that they truly record the decision taken by the meeting and thus could be used as the bases of action. To

ensure that they sustain such a character, before the minutes are confirmed they are either circulated among the members and are confirmed at the following meeting after considering the comments, if any, of the members who were present at the meeting, or they are read out at the next meeting and, if approved, are recorded. In this way, any clerical error pointed out by the members or by the office is rectified. However, while being confirmed, the minutes cannot be amended or altered to make up any deficiency therein due either to a failure to consider a particular aspect of the matter or a change in the position having taken place subsequently which resulted in its non-implementation. In the first mentioned case, a fresh resolution should be recorded to substitute the earlier resolution and in the second case, the earlier decision should be rescinded. In no case, the decision already taken should be interfered with.

To show that such is the law and practice in these circumssances an extract from the judgment in an English case is given below :

Lord Esher M.R., *in Re Cawley & Co.* (1889, 42 Ch. D. observes : "Something happened with regard to that resolution which I cannot help thinking was most dangerously irregular, for the secretary, either in consequence of some supposed power vested in him or of some idea of his own, some time afterwards inserted in the minutes of the meeting of the 18th, certain dates as the dates of the calls. In my opinion that was the most dangerous thing that could well be done. Minutes of Board meeting are kept in order that the shareholders of the compay may know exactly what their directors have been doing, why it was done, and any shareholder looking at these minutes as they now stand would suppose the dates were agreed upon at the meeting, and were then filled in, whereas in truth no dates were agreed upon by the directors at all. The dates form no part of the resolution and yet here is the entry made as though they formed part of the resolution then passed. I trust that I shall not again see or hear of the secretary of a company, whether under superior directions or not otherwise, altering minutes of the meetings either by striking out anything or adding anything. The proper mode of fixing the dates would have been by resolution, and then entering that resolution in the minutes".

After the minutes have been approved, and resolutions to alter or amend them, if necessary, have been recorded, the next important matter to which the meeting generally addresses itself is the report of the management on action taken on the decisions arrived at in the earlier meeting. If no action has been possible on any item, the fact is resported and, where necessary, further directions are given or a decision is taken to alter the course of action. All these decisions are minuted but only briefly.

The specimen of an agenda of meetings of Board of Directors and that of share holders as well as minutes of such meetings are given below :

GENERAL AGENCIES LIMITED
Registered Office : 197, Indrasprastha Marg,
New Delhi - 110002

Dated.....

To

Dear Sir/Madam,

I have to inform you that the 65th Meeting of the Board of Directors of the abovementioned company will be held on 28th March, 1978, at 2.30 P.M. at the registered office to consider the following matter :

AGENDA

1. Confirming the minutes of the last meeting :

   The minutes of the 64th meeting of the Board were circulated among the directors by the Secretary *vide* his letter No. BD/64 dated 18-2-1978. No comments thereon have been hitherto received. If any are received hereafter, they will be placed on the table.

2. Approving the transfer of 16 equity shares, No. 42 to 57 inclusive in the Capital of the Company.

   Pursuant to Section 108 of the Companies Act, the relevant transfer deed in the prescribed form with the date of presentation to the prescribed authority stamped and otherwise endorsed and signed both by the transferor and transferee, together with the share certificate, shall be placed on the table.

3. Considering the monthly report presented by the General Manager on the working of the company.

   A copy of the report for the month of February, 1978, is attached as Annexure I to this Agenda.

4. Considering and adopting the statements of account of the company for the year ended 31-12-1977 together with the auditor's report thereon.

   Copies of statements of account and that of auditor's report are attached as Annexure II to this Agenda.

5. Approving the deed for acquiring the premises situated at 40, Mahatma Gandhi Road, New Delhi on 20 years' lease for establishing an annexe to the Office.

   A copy of the lease deed drafted by the Company's solicitors is enclosed as Annexure III to this Agenda.

6. Fixing the date of the next meeting.
7. Considering any other matter with the permission of the Chairman.

Yours faithfully,
By Order of the Board
Sd/-
(Bahadur Singh)
Secretary

GENERAL AGENCIES LIMITED

Minutes of the 65th Meeting of the Board of Directors held on 28-3-78 at the Registered Office of the Company.

The following members were present :

1. Shri M.V. Vijayan, Chairman (in chair)
2. Shri O.N. Verma
3. Shri B.S. Kulkarni } Directors
4. Shri N.M. Ganguli

and Shri Bahadur Singh Secretary

In Attendance :

Messrs K. Chakrapani, Solicitor
J.L. Mehta, Auditor.

1. Confirming the minutes of the last meeting :

The minutes of the meeting of the Board held on 18-2-78 as circulated among the directors were approved. Since no comments thereon had been received, the Chairman, in token of the approval, signed the minutes.

2. Approving the transfer of 16 equity shares in the capital of the Company Nos. 42 to 57 inclusive.

The transfer deed submitted by the transferee Shri G. Basu in respect of 16 equity shares Nos. 42 to 57 was examined and approved. The Secretary was authorised to record the transfer deed after fixing thereon the seal of the company.

3. Considering the monthly report of the working of the Company presented by the General Manager.

The monthly report for February, 1978 on the working of the company was considered and ordered to be recorded. The General Manager was requested that in similar reports in future, comparative figures of the previous months in respect of production, sales and purchases should be included.

4. Considering and adopting the statements of account of the Company for the year ended 31-12-1977 together with the auditor's report thereon.

The final statement of accounts for the year ended 31-12-1977 as circulated was considered, along with the report of the auditor thereon. An explanation was sought from the auditor as regards the remark that the system of internal control on fixed assets required to be strengthened. Shri J.L. Mehta, the auditor, explained that in the absence of any internal control, it was necessary for them to physically inspect each and every item of plant which entailed considerable labour and consequently delayed the preparation of accounts. After some discussion, the suggestion was accepted and the General Manager was asked to introduce forthwith the system as proposed by the auditor.

5. Approving the lease-deed for acquiring on rent the premises situated at 40, Mahatma Gandhi Road, New Delhi, for establishing an annexe to the office of the Company.

The draft deed for taking over on 20 years' lease the office premises situated at 40, Mahatma Gandhi Road, New Delhi as circulated was considered. The Solicitor, Shri K. Chakrapani, was asked to explain the implications of clauses 3 and 5 in the deed as regards liability to keep the premises in proper repair during the period of lease as well as payment of Municipal Taxes assessed by the Corporation from time to time. On receiving the explanation, the dirctors were satisfied that they were in order and the lease deed was approved. Shri M.V. Vijayan was authorised to sign the same on behalf of the Company and affix the Company's seal thereon.

6. Fixing the date of the next meeting :

It was resolved that the next meeting of the Board be held on 13-4-1978 at 4 p.m. as the Registered Office of the Company.

7. Miscellaneous :

The Chairman reported that on account of an increase in the volume of work, it was felt that the Sales and the Accounting Organisations required to be expanded. For the purpose, he proposed that one accounts clerk and one sales clerk should be appointed immediately in the regular scales of pay of the Company to augment the organisation. The proposal was accepted unanimously.

The meeting concluded with a vote of thanks to the chair.

M.T. Vijayan
Chairman,
Board of Directors

DELHI MILK SUPPLY LIMITED
AGENDA

The Fifth Annual General Meeting of the Company shall be held at the Registered Office of the Company on the 23rd June, 1978, at 4 o'clock, to consider the following matters ;

1. Considering and adopting the Balance Sheet and the Profit and Loss Account of the Company for the year ended 31-3-78 together with the Directors' report thereon.
2. Appointing two directors in place of Shri G.S. Mulley and V.S. Murty who retire by rotation under Article 58 of the Articles of Association of the Company. Both the directors are eligible for re-appointment.
   A proposal has also been received under Section 257 of the Companies Act from Shri R.N. Gupta, a shareholder, that Shri Prakash Narain Tandon be appointed a director of the Company.
3. Appointing auditors for the year 1978-79 and fixing their remuneration. Shri G.S. Pathak, Chartered Accountant, who has audited the accounts of the Company for the year ended 31st March, 1978, retires but is eligible for re-appointment.
4. Declaring a dividend.
5. Any other matter with the permission of the Chair.

By Order of the Board
Sd/-
(R.P. Lall)
Secretary

Dated : 30-5-78.

DELHI MILK SUPPLY LIMITED

Minutes of the fifth annual general meeting held on Wednesday, the 23rd June, 1978, at 4 o'clock at the Registered Office of the Company.

The following were present :

Present : Shri D.C. Gaekwad, Chairman of the Board of Directors, Messrs. K.S. Atteya, G.R. Khandelwal, S.L. Verma (Directors), with thirty shareholders.

In attendance—Shri N.G. Desai, Solicitor, and Shri R.P. Lall, Secretary.

1. The Balance Sheet of the Company and the Profit and Loss Account for the year ended 31-3-78 as well as the directors' report thereon which were already in the hands of the shareholders were considered as read.

The Secretary, Shri R.P. Lall, read the report of the auditors dated 13-9-1968 on the accounts.

Shri Saudagar Singh, a shareholder, proposed and Shri Ram Singh another shareholder, seconded that the statement of account and directors' report thereon as circulated be adopted. Thereupon it was.

RESOLVED : "That the Directors' Report and the Balance Sheet and the Profit and Loss Account for the year ended 31st March, 1978, be and hereby approved and adopted:"

2. Shri D.R. Gupta, a shareholder proposed and Shri Krishna Mohan seconded that Shri Prakash Narayan Tandon be appointed a director of the company in one of the two vacancies created on the retirement of directors. Thereupon it was.

RESOLVED : "That Shri Prakash Narayan Tandon be and is hereby appointed as director of the Company."

Shri B.M. Sethi proposed and Shri R.L. Dave seconded that Shri Mulley who had retired by rotation under Article 58 of the Articles of the Association of the company be reappointed as the Director of the company. Thereupon it was

RESOLVED : "That Shri R.L. Mulley be and hereby is appointed as director of the company."

3. Shri D.R. Gupta proposed and Shri Krishna Mohan seconded that Shri G.S. Pathak, Cahrtered Accountant, the retiring auditor of the company, be re-appointed as the auditor for the current year ending 31-3-79 on a consolidated fee of Rs. 5,000. Thereupon it was

RESOLVED : 'That Shri G.S. Pathak, Chartered Accountant, be and is hereby appointed as auditor of the Company for the year 1978-79 at consolidated remuneration of Rs. 5,000"

4. Shri D.R. Gupta proposed and Shri B.M. Sethi seconded that a dividend of 6% on equity share of the company be paid on the basis of accounts of the company for the year ended 31-3-1978. Thereupon it was

RESOLVED : "That a dividend of 6% be paid on equity shares of the Company out of the profits of the company for the year ended 31-3-1969."

5. Shri Ram Piare Lal proposed and Shri Laxmanan seconded that the members assembled may place on record their gratitude for the Board

of Directors for conducting the affairs of the company very competently and profitably.

Sd/- F.C. Gaekwad
Chairman

XY COMPANY LIMITED

Registered Office : 21, Indraprastha Marg, New Delhi-110002.

Notice is hereby given that the Third Annual General Meeting of the shareholders will be held at the company's registered office at 21, Indraprastha Marg, New Delhi-110002 on 31st March, 1978 at 4 o'clock in the afternoon to transact the following business :—

(i) To consider and if thought fit to adopt, with or without modification, the Balance Sheet of the company as at 31st December, 1977 the profit & Loss Account for the year ending 31-12-1977 and the Report of the Directors thereon.

(ii) To declare a dividend.

(iii) (a) To elect a Director in the place of Mr. A who retires from office by rotation in accordance with Article 39 of the Articles of Association of the Company, but being eligible, offers himself for re-election.

(b) To appoint a Director in the place of Mr. B who was appointed by the Board to fill the casual vacancy caused by the resignation of Mr. Q and who retires from office by rotation in accordance with Article 39 of the Articles of Association of the Company, but being eligible, offers himself for re-election.

(iv) To appoint of Auditors to hold office from the conclusion of this meeting till the conclusion of the next annual general meeting and to fix their remuneration. Messrs. K & Co., Chartered Accountants, are the retiring Auditors and are eligible for re-appointment.

(v) As Special Business : To consider and, if throught fit, to adopt the following resolution, with or without modification as a special Resolution: "Resolved that in the 4th line of Article 130 of the Articles of Association of the Company, after the words 'paid-up-capital' the words 'and free reserves' be and are hereby added".

Explanatory Statement pursuant to Section 173 of the Companies Act, 1956 regarding Item No. (v) :

The paid-up capital of the Company and its free reserves are Rs. 15 lakhs and Rs. 20 lakhs respectively. As the position stands to-day, the Directors have powers to raise loans up to Rs. 15 lakhs only, of which Rs. 5 lakhs have already

been raised. The Company is contemplating an expansion on a big scale for which extensive borrowing will be necessary. Therefore, it has been thought proper that the Directors should have power to borrow not only up to the amount of that share capital but also free reserves. It may be noted that Section 293 of the Companies Act permits the Directors to raise loans equal to paid-up capital and free reserves ; an amount in excess of that can be borrowed only with the consent of the shareholders in general meeting.

Notes :

(i) Every Member who is entitled to attend the meeting and vote thereat may appoint a proxy to attend and vote instead of himself and the Proxy need not be a Member.

(ii) The Register of Members and Transfer Books of the Company shall be closed from the 1st March, 1978 to 15 March, 1978, both the days inclusive.

(iii) The dividends on shares as recommended by the Directors of the Company for the year ended 31st December, 1977, if declared at the meeting, will be made payable on and after 1st May, 1978 to those members whose names appear on the Register of Members of the Company on 15th March, 1978.

Proxy : A proxy is an instrument in writing executed by a shareholder authorising another person to vote on his behalf in his absence. Any member of a company entitled to attend and vote at a meeting of the company is entitled to appoint another person (whethere a member or not) as his proxy to attend and vote in his place, but a proxy so appointed cannot address the meeting. Further, the proxy is not etitled to vote except on a poll.

The aforementioned privilege, enabling a member to appoint a person other than himself as a proxy, has been granted by the Companies Act, 1956. The Act further provides that the form of proxy sent to the members, along with the agenda, must prominently display that fact.

Any provision in the articles of association, requiring the instrument appointing proxy to be lodged with the company more than 48 hours before a meeting in the case of public companies and their subsidiaries which are private companies shall have effect as if 48 hours had been specified therein. The instrument appointing the proxy should be in writing, signed by the appointer or his attorney who has been duly authorized in writing.

The proxy forms deposited with the company may be inspected by a member 24 hours before the time fixed for the commencement of the meeting.

Ordinary and Special Resolution : A resolution is an ordinary resolution when the same is passed by a simple majority of votes cast either on a show of hands or an a poll. It is a special resolution when an intention to purpose the resolution as a special resolution had been duly specified in the notice calling the general meeting and the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) are not less than three times the number of the votes cast against the resolution.

Sense of the Meetings : The sense of the meeting can be ascertained in the following ways :

(*a*) *By acclamation or voice* : When a proposition is put up to the meeting by the chairman, members present at the meeting, who are in favour of the same signify their approval or disapproval by saying Yes or No as the case may be, or merely by cheering or clapping. It is the most elementary method of ascertaining the sense of a meeting which suffers from the disadvantage that the member of votes cast in favour or against a proposal or resolution, cannot be judged very accurately. On this account, this method is usually adopted, when it is expected either that the voting on the issue under consideration will be unanimous, or that the votes cast in favour of it would be by far the larger than those cast against it.

(*b*) *By show of hands* : It is another simple method for ascertaining the sense of a meeting. The chairman, in this case, first requests the members who are in favour of the proposition or resolution under consideration, to raise their hands. The number of hands raised is counted. Afterwards, the numbers that are not in favour of the resolution or proposal, are similarly requested to raise their hands. Again, the number of hands so raised is counted. The count of number of hands raised in each case indicates the strength of the voting for or against the proportion. On the basis of such a determination, the chairman declares the result of the division. This method, like the one stated earlier, can be used effectively only where every person present at the meeting, has one vote. Since this may not be so in the case of a company meeting, the method, usually, is not followed.

(*c*) *By division* : Under this method, the members in favour of the proposition or resolution walk into one section of the Meeting Hall or walk into an adjoining room, whereas the members who are against, assemble in another section of the Meeting Hall or walk into another adjoining room. After the members have so divided themselves, the number of members belonging to the two groups is counted. The method is not considered suitable for adoption at company meetings. It is, however, commonly used in political meetings.

(*d*) *By Ballot* : In this case, members record their votes on ballots or voting papers and deposit them into ballot boxes provided for the purpose. Subsequently, the scrutinisers count the votes and submit the counts of votes cast in favour or against, to the chairman who, on the basis of the count, declares the result of the bollot.

(*e*) *By Poll*: This method of voting is, usually, adopted in company meetings. Under this method, a member can exercise his vote either in person or by proxy ; also weightage can be given to the votes of members on the basis of various types of shares with voting rights held by them. It thus ensures that the sense of all the shareholders, whether present at the meeting or not on weightage being given to number of shares held by each one of them, shall be taken into consideration in arriving at the decision.

A poll can be demanded in accordance with the provision contained in the articles of association. Usually, such a demand must be made immediately before or on the declaration of the result of the voting on any resolution on a show of hands. Under the Companies Act, the poll may be demanded by a person or persons specified in clauses (a) to (d) of sub-section (1) of Section 179.

If a poll has been validly demanded and relates to a question of adjournment, it must be taken immediately. A poll, if it is demanded on any other question (not being a question relating to the election of a chairman which is provided for in Section 175), it must be taken not later than 48 hours from the time of demand. Two or more persons, usually, are appointed as scrutineers to examine the proxy papers as well as voting papers for determining the result of voting. It is also necessary to exercise some coutrol over the voting papers to guard against any unauthorised person casting a vote.

The various steps involved for ascertaining the voting strength either in favour of or against a proposition on the basis of poll are stated below :

(i) Every member present at the meeting and entitled to vote is provided with a voting card. It is printed ; also space is provided therein to enter the name of the members, the numbers and classes of shares held by them as well as to record whether he is in favour of, or against, the resolution. On the voting card, the member also declares whether he is acting as a proxy and, if so, for whom, as well as the number and classes of shares held by the member for whom he is acting. The voting cards, usually are printed in different colours in the case of a company having more than one class of shares.

(ii) After the members have filled in the voting cards, these are collected and made over to scrutineers.

(iii) The scrutinisers compare the entries on the voting cards with the lists of members and their shareholding provided to them in advance, to confirm that each member has voted only in respect of shares held by him or in respect of which he has been authorised to cast the vote. Thereafter, they draw up lists of votes cast in favour of the resolution as well as in respect of those cast against it. These lists are submitted to the chairman who, on the basis of these lists, declares the result of the poll.

Procedure followed as regards casting of votes by members in the case of a poll : (a) The chairman briefly explains to the members the procedure that would be followed, and appeals to them that no member should either leave or enter the room while the voting is in progress.

(b) The members are advised to go into an adjoining room for collecting their voting papers. In the room, an arrangement is made in advance for the voting paper or cards to be delivered to them. There, the members fill up the papers in seclusion. For the sake of convenience, members, usually, are divided into four or five groups. The members of each group—one after the other—mark the ballot papers at a table or tables provided for the purpose, and while a member is marking a voting paper, no member is present. This ensures secrecy in respect of voting.

The ballot papers are issued only to the members after their credentials have been verified and on their surrendering the admission cards to the meeting earlier issued to them. For their guidance, lists of members and their respective shares are placed on the tables, at which the members record their votes for their reference.

When the members have filled in the voting cards these are placed in the ballot boxes.

Duties and Powers of the Chairman

A. *Duties* : It is the duty of the chairman of a meeting to ensure that: (i) the meeting is properly constituted and convened ; (ii) the business is conducted in the order laid down in the agenda, except when a change in the order has the approval of the meeting ; (iii) no business, in regard to which proper notice has not been given, is brought up for consideration of the meeting ; (iv) order is maintained at the meeting ; (v) the motions and amendments brought before the meeting are in order and no discussion among the members take place except when there is a specific motion before the meeting ; (vi) the sense of the meeting on each matter considered is properly ascertained, and a poll, if properly demanded, is duly taken; (vii) an opportunity is given to the minority to express its views.

It is also the duty of the chairman to exercise a casting vote in appropriate circumstances, if the company's articles authorize him to exercise such a vote.

B. *Powers* : The powers of the chairman are as follows :

(1) *To decide points of order*: While the meeting is in progress and a member is speaking, if another member gets up and enquires as to whether the statement made by the speaker is in order, the latter is said to have raised a 'point of order' and the chairman is empowered to give his ruling on that point, which is final and binding on the members. Generally, points of order relate to breaches of rules, conduct of members, relevancy of remarks, holding of private conversation, etc.

(2) *To decide the priority of speakers* : When more speakers than one stand up and wish to speak at one and the same time, the chairman is empowered to decide in which order they should speak, and his decision in this regard is final and binding on the meeting.

(3) *To stop discussion on a matter* : In order to stop the discussion on a particular motion from being unnecessarily dragged on, it is within the power of the chairman to stop the discussion and put the motion to vote.

4. *To have disorderly persons turned out* : If, at the meeting, some persons behave in a disorderly manner and refuse to listen to the admonition of the chairman, he may ask them to leave the meeting and, if necessary, get them turned out of the meeting with the least physical force.

5. *To exercise a casting vote, if allowed by the articles* : Normally, the chairman has two types of votes, viz, (i) deliberate vote, i.e., the vote which he casts in his capacity as a member of the company ; and (ii) casting vote, which he exercises in the event of a tie.

Majority Rule-how far the governing principle of Company Management : The rule of supremcay of the majority is usually referred to as the rule in Foss v. Harbottle (1843) 2 Hare 461. The management of companies is based on the principle of majority rule. Ordinarily, the decision of the majority is the rule for the minority also. This principle has occasionally been abused and rhe whip of the majority has often produced sullen effects, prejudicial to the best interests of the shareholders. Therefore, the supremacy of the majority rule is subject to certain exceptions which are as under.

Until the commencement of the Companies Act, 1956, the only remedy available to an opperssed minority was to petition to the Court to wind up the company on the ground that it was just and equitable to do so. However, in many cases, it is not in the interest of the oppressed minority to have the company wound up. The liquidation of the company may result in the sale of its assets at

break-up value, without regard to the value of the goodwill or know-how of the company and the minority shareholders who, urged by the majority shareholders' oppression, petitions for a winding-up order might in effect play their opponents' game. In an attempt to meet such cases, the law now (Sections 397 to 409) gives an oppressed miniority shareholders a remedy alternative to a petition for compulsory winding up under the 'just and equitable' clause. These Sections empower the Court and the Central Government to deal with such situations of oppression and mismanagement. Members (not less than 100 in number or not less than 1/10th of the total number of members, whichever is less, or holding not less than 1/10th of the issued share capital if the applicants have paid all calls and dues in the case of a company having a share capital; not less than 1/5th of the total number in the case of a company not having a share capital) of a company may apply to the Court for relief on the ground that the affairs of the company are being conducted in a manner either oppressive to any member or members or prejudicial to the interest of the company as a whole. The Central Government may also apply or authorise a member or members to make an application under Section 397, or 398, though the requisite conditions mentioned within the brackets above are not satisfied (Sections 397, 398 and 399).

Under Section 408, the Central Government is empowered to appoint such number of persons as it may, by order in writing, specify to hold office as directors in the company, where, on the application of at least 100 members or of members holding at least 1/10th of the total voting power therein, or of its own motion, the Central Government is satisfied that these appointments are necessary in order to prevent the affairs of the company from being conducted, *inter alia*, in a manner which is prejudicial to public interest.

It is thus evident from the above discussion that the majority rule may not always prevail over the minority if the Court is satisfied about the existence of the circumsatnces envisaged by the above-mentioned Sections.

(ii) The above-mentioned exception relates to individual membership rights. Another exception is one relating to qualified minority rights. While the individual membership rights can be exercised by an individual shareholder, qualified minority rights require the co-operation of a minority group of specified size within the corporate body. For example, under Section 169 a minority of not less than 1/10th of the paid-up capital carrying voting rights at the date of the deposit of the requisition may requisition the holding of an extraordinary general meeting. In the case of a company not having a share capital, the requisition may be placed by such number as has not less than 1/10th of the total voting power of all the members.

(iii) The right of the minority specified in Section 179 (at least 5 members having the right to vote on a resolution in the case of a public company ; or in the case of a private company, one member having the right to vote if not more than 7 members are present and 2 members if more than 7 such members are personally present ; or any member present in person or by proxy and having not less than 1/10th of the total voting power ; or an aggregate of not less than 1/10th of the total paid-up capital carrying votes at the meeting) to demand a poll cannot be excluded by the articles.

(iv) A minority of 200 or more members or of members holding not less than 1/10th of the total voting power in the case of a company with a share capital, or a minority of 1/5th or more of the members on the company's register of members may apply to the Central Government for the appointment of inspector (s) to investigate into the affairs of the company.

The principle, as discussed above, is a simple majority rule, i.e., any excess of votes cast in favour of a resolution over those cast against. But certain matters in connection with the company management require special resolution, (e.g., Sections 17,21,31,100, etc.), i.e. a three-quarters majority. Certain other measures require other qualified majorities. To this extent, these constitute an exception to the 'simple' majority rule. It may be noted from these instances that a negative right of the minority, namely, to preserve the *status quo* by vetoing a constitutional or other change requiring a qualified majority, may arise. But this negative right is not comprised in the expression "qualified minority rights" referred to in (ii) above.

Motions and Resolutions : A motion is a proposition formally made at a meeting ; it is liable to alteration or amendment prior to its being adopted by the meeting. Before a motion can be placed at a meeting, a notice is generally required to be given. The mover should submit the motion in writing duly signed. A motion, before it is discussed, is usually seconded by another member, although the rule is that it need not be seconded unless the articles so require. It can be entertained only if it is within the powers of the meeting and within the scope of agenda of the meeting. A motion properly drawn up should be couched in definite and unambiguous words ; also it should be in an affirmative form commencing with the word "That".

After the motion has been proposed and seconded, the chairman invites members to discuss it. If a number of members offers to speak on it, the chairman determines the order in which they shall speak and fixes the time for which each member may speak. To start discussion on the motion, the mover is requested to

introduce the motion and after all the members have spoken, he is asked to reply to the various points raised by them.

After the motion has been debated, it is put to vote either with or without amendments, as the case may be. In the event of the same being adopted, it becomes a resolution. As has been stated earlier, the motion should commence with the word 'that'. As a result if it is passed into a resolution it is recorded as "Resolved that....."

Formal motions are those which a member may move for any one of the following purposes, viz.. (i) adjourning the meeting ; (ii) dropping an item on the agenda from discussion ; (iii) adjourning the debate on a motion ; (iv) applying 'closure' to a motion.

The motion in all the faoresaid four cases respectively are drawn up in the following forms : (i) "That this meeting be now ajourned" ; (ii) "That this meeting may proceed to the next business" ; (iii) "The debate on the motion be adjourned to the next meeting" ; (iv) "I move that a closure be applied to the discussion on the question",

The objective in moving the motions aforesaid is to expedite the disposal of, the business. But such motions can also be misused for impeding the transaction of business. Such motions therefore are discribed as dilatory motions.

Amendments : A motion after it has been moved can be amended by : (i) adding some new words to the motion ; or (ii) substituting some words for some other words : or (iii) deleting some words from the motion ; or (iv) altering the position of words and phrases in the motion.

An amendment of a motion can be validly made if it is germane to the original motion and does not negative it ; for a negative amendment is tantamount to the counter-proposal. Further, the amendment should be within the scope of the business before the meeting. A number of amendments to an original motion can be moved but a member can move only one amendment. The chairman of the meeting, being the controlling authority, determines the order in which the amendments shall be considered. If an amendment is moved to alter an amending motion, the second amendment is discussed first and only after it has been voted upon, the first amendment is considered.

A debate on an original motion may be interrupted by various methods or technical devices which are briefly discussed hereunder.

(a) *Closure* : It is a weapon to put an end to a matter, the discussion whereon becomes undesirably lengthy. The method is based on the principle that

every member who has the right of audience must be afforded the opportunity to speak. It is put in this form : "that the question be now put". This closure is useful for the minority or against any influential member who may cause delay in feeling the pulse of the meeting on the subject of the debate.

(b) *Previous question* : In this case, as contradistinction to closure motion the intention of which is genuinely to stop a lengthy discussion and close it by putting it to vote, a point of order is taken in the common interest that it is undesirable to debate or discuss a subject; an interruption motion is moved to stop the discussion and a new subject is introduced If a previous question on motion is lost, the main question which is interrupted is no longer discussed but is put to vote. In the event of the previous question motion being carried, the new subject then takes the precedence over others ; thus the motion is shelved for good.

(c) *Proceed to next business* : The object of this motion is also to stop discussing or to shelve an undesirable motion. It is proposed thus : "That this meeting does proceed to the next business." It is then seconded and put to vote by the chairman. The original motion is shelved if the motion is carried ; if not, the resumption of the main motion takes place after a lapse of time.

(d) *Point of order* : When a member is speaking in a meeting, any other member may rise up to speak to a point of order. At this, the former tempororily sits down. Ordinarily, the point of order pertains to any breach of rule for conducting the meeting, want of quorum, any disorderly conduct of any member, etc. The chairman has to decide the question regarding the point of order and give his ruling at the earliest. The chairman must be fair and impartial in his ruiing, and if he is so, his ruling is unimpeachable. Thereafter, the interrupted speaker resumes his speech.

(e) *Adjournment* : It may be in respect of the debate or an item or of the meeting itself. It signifies the postponement till a fixed time any further extension thereof. Such a motion is concluded thus : "That the meeting be adjourned". The articles of a company may provide for the procedure as to adjournment ; the chairman must act in accordance therewith. The meeting may also be adjourned *sine die* ; otherwise the chairman has to specify the date, time and place of the adjourned meeting. As a meeting is ordinarily adjourned to the same day in the next week, no fresh notice thereof is required to be given. If, however, the period of adjournment is for 30 days or more, then as per Regulation 53 of Table A of Schedule I to the Act, a fresh notice would be needed. A new business cannot be transacted at such adjourned meeting, the objective being to finish the unfinished work of the original meeting.

Registration of certain resolutions : According to Section 192, a copy of every resolution (together with a copy of the statement of material facts annexed under Section 173 to the notice of the meeting in which such resolution has been passed) or agreement to which this Section applies printed or typed and duly certified under the signature of an officer of the company, must be filed with the Registrar, within 30 days after the passing or marking thereof, and the Registrar shall record the same. Where the articles have been registered, a copy of every such resolution or arrangement which has the effect of altering the articles must be embodied in or annexed to every copy of the articles issued after the passing of the resolution or making of the agreement. Where, however, the articles have not been registered, a printed copy of the same should be supplied to any member on request on a charge of Re. 1. These provisions apply to the resolutions and agreements referred to in Section 192 (4) which the students must read in detail.

Drafting of resolutions : A resolution is the formal expression of the will of the members as approved and passed at a meeting. The resolutions passed both at the company meeting and the Board meeting are permanent records of the Company's various decisions and deliberations. Member's resolutions are more important and they are generally required to be filed with the Registrar. Care, a good command over language and comprehensive knowledge of the provisions of Law are of imperative necessity for drafting resolutions. Precision, lucidity and unambiguity are the essential qualities of a resolution. The words employed therein should be unequivocal and taken from the statute itself as far as practicable in order that the provisions of law are strictly complied with. For example, while drafting a Board resolution for issue of rights shares under Section 81, the requirements of the Section should be taken from the language of the Section, with suitable additions and alterations so as to give the resolution a precise and lucid form. Likewise, while drafting resolutions under Sections 356, 358, 360 and 314 the material terms of the contract or appointment have got to be suitably embodied so as to fulfil the requirements of the Act. Unnecessary words or extraneous detail should be studiously eschewed ; otherwise they may give rise to controversy and complications.

Usually, a resolution commences thus : "Resolved that" and then states the relevent things to be done. No recitals like "whereas" is necessary in company practice.

In the event of the resolution being lengthly, it should be divided into paragraphs and chronologically arranged. The following are a few forms of resolutions which are given below by way of illustrations.

(1) *Resolution for the Registration of Transfer of Shares* :

Resolved that transfers of the company's shares (as per the transfer sheets

placed before this meeting and initialled for purposes of identification by the Chairman and Secretary) be and are hereby approved. Further resolved that the secretary be, and is hereby, authorised to register the said transfers in the company's books and records and to take all other necessary steps to implement this resolution,

(2) *Resolution of allotment of shares* :

Resolved that allotments of the company's shares (as per the allotment sheets placed before the meeting and initialled for purposes of identification by the chairman and secretary) be and are hereby approved. Further resolved that the Secretary be and is hereby authorized to implement this resolution by sending out allotment letters and letters of regret, to the approved and disapproved applicants respectively, and by taking all other necessary steps (such as refund of excess amount received on application, transfer of application moneys from the special bank account to the company's general bank account and filing return of allotments with the Registrar).

(3) *Resolution for recommending dividends* :

Resolved that dividends at the rate of 10% (subject to deduction of income-tax) on the company's equity shares payable out of the company's profits for the year ended December 31, 1977, be and is hereby recommended for declaration at the 57th annual general meeting of the company to be held on.....

(4) *Resolution for appointment of staff* :

Resolved that Mr.....(whose application for employment has been duly considered by the Board) be and is hereby appointed as the Company's accountant from the 1st day of January, 1978, on a consolidated salary of Rs. 900 per month (in the grade of 800-25-1200). Further resolved that the General Manager be and is hereby authorized to issue the appointment letter to the said Mr.....in the form already approved by the Board, providing for the termination of his services by three months' notice on either side.

(5) *Resolution for adoption of the Board's Report* :

Resolved that the attached draft of the 43rd annual report of the Board of Directors (which is initialled for purpose of identification by the Chairman and Secretary) be and is hereby approved and adopted. Further resolved that the Chairman be, and is hereby, authorized to sign the report for and on behalf of the Board and to take all necessary steps for the purpose of its publication and supply to the members.

(6) *Resolution for purchase of investments* :

Resolved that 4% Government of India Promissory Note 1979-80 of the face value of Rs. 10,000 (Rupees Ten Thousand) be and is hereby, purchased at

the best market rate through Messrs. Place Siddons and Gough, the Company's brokers, and that the Secretary be, and is hereby, authorised to take all necessary steps for implementing this resolution.

(7) *Resolution for sale of a fixed asset* :

Resolved that the offer of Rs. 50,000 (Rupees Fifty Thousand) received from Mr————of————for the purchase of the company's motor-car (Chevrolet 1972 Sedon-registered No.....) be and is hereby accepted and the Secretary be, and is hereby, authorized to take all necessary steps for the transfer of ownership in the said motor-car to the said Mr.....on receipt of the amount aforementioned.

(8) *Resolution for marking calls on partly paid shares* :

Resolved that a call of Rs. 2 per share, on the equity shares of the company be made upon members of the company and that the same be made payable on or before the Ist day of January 1978 at Calcutta, and that all calls which remain unpaid by that date shall bear interest at the rate of 5% per annum from the date mentioned above until the amount thereof is paid.

(9) *Resolution for forfeiture of shares* :

Resolved that 100 equity shares of Rs. 10 each bearing distinctive numbers 101 to 200 inclusive, whereon, a sum of Rs. 8 per share has been paid, and which at the date of this resolution stand registered in the name of A B C of 10 Hastings Street, New Delhi, who has failed to pay the call of Rs. 2 per share due on the said shares on the Ist day of December 1977, and has failed to comply with the notice dated the 15th day of January 1978, served upon him, be and are hereby forfeited, and the shares be disposed of as the Directors shall think fit.

(10) *Resolution for re-issue of forfeited shares* :

Resolved that 100 shares of Rs. 10 each, Rs. 8 paid up, numbered 101 to 200, having been duly forfeited by a resolution of the Board dated 1st March, 1978, be re-issued as fully paid to Mr. Fakruddin of the Institute of Chartered Accountants, New Delhi on his paying Rs. 2 per share representing the unpaid call of Rs. 2 and premium of Rs. 2 per share, and that the said transfer be, and is hereby, passed for registration. And that a certificate for the share in the name of Mr. Fakruddin be duly sealed and signed.

(11) *Resolution for issue of debentures* :

Resolved that 5,000 debentures of Rs. 1,000 each in the company, be offered to the public for subscription of the floating security of the company's property, such debentures to bear interest @ 10% per annum and to be redeemable at par on the.....day of.....19.....or after that date, and that Messrs Zia Uddin and Bhakat Ram be, and are hereby, constituted a committee : (a) to consider the

appointment of trustees for the debentureholders; (b) to arrange with the company's solicitors, Messrs Kutharia & Co., as to the Trust Deed, the Debenture Bond and the prospectus; and (c) to place their report before the Board within one month from this date.

(12) *Resolution for removal of director*:

The meeting, having carefully considered the proposal to remove Shri G.D. Sondhi from his office of director of this company, and having also considered the representations made by him in this behalf, is of the view that the said director be removed from his office; and it is, therefore, resolved that the said Shri G.D. Sondhi be, and is hereby, removed from his office of director, from the first day of January, 1978.

(13) *Resolution for the alteration of articles under Section 31*:

Resolved that this meeting records its consent, by the special resolution, to amendment of cause 25 of the company's Articles of Association, in such a manner as to substitute the words 'four persons' in place of 'three persons', as appearing in the said clause.

(14) *Resolution for the adoption of statutory report*:

Resolved that the Statutory Report, prepared under Section 165 of the Companies Act, 1956, relating to the period from the date of incorporation of the Company to the 30th June, 1977 as laid before the meeting, and as certified by the Managing Director and by two other directors be, and is hereby approved and adopted.

(15) *Resolution for appointment of an auditor other than the retiring auditor*:

Shri P. Purushotam proposed and Shri B. Banerjee seconded the motion to appoint Messrs Gogia Pasha & Co., Chartered Accountants, as the auditors of the Company for the ensuing financial year, in place of the retiring auditors Messrs Swamy & Co. The Secretary of the company explained that the legal formalities in connection with the matter had been duly complied with. The motion, on being put to vote, was carried unanimously; and it was resolved that Messrs Gogia Pasha & Co., Chartered Accountants be, and are hereby appointed as auditors of the Company for the financial year ending 30th June, 1977, at a fee of Rs. 5,000 per annum.

(16) *Resolution under Section 293(1)(d) authorising the Board to borrow (as an ordinary resolution)*.

Resolved that the Board of Directors be and are hereby authorised to borrow moneys up to a limit of rupees one crore inclusive of the moneys already borrowed by the company (apart from temporary loans obtained from the company's bankers in the ordinary course of business), may exceed the aggregate of the paid-up capital of the company and its free reserves, that is to say, reserves not set

apart for any specific purpose, and that the Board of Directors may, in exercise of the said borrowing powers conferred on them, borrower such moneys on such terms as to rate of interest, repayment, security or otherwise as they may deem fit and in particular, be and they are hereby authorised to mortgage, charge or create any security over the whole or any part of the undertaking of the company, its properties or assets.

(17) *Resolution for alteration of Memorandum under section 17 (As a special resolution)* :

Resolved that the Memorandum of Association of the Company be altered in the manner following, that is to say, the existing clause XI of the Memorandum be deleted and the following substituted therefor :

The capital of the company shall be Rs. 1,00,00,000 (Rupees one crore) divided into 1000-7% (seven per cent) Redeemable Preference Shares of Rs. 100 each ; 2000 Preference shares of Rs. 100 each ; and 97,000 Equity shares of Rs. 100 each, with power to increase or reduce the capital.

(18) (a) *Resolution for special business (As special resolution)* :

Resolved that to comply with the provisions of Section 314 of the Companies Act, 1956, the Company does hereby consent to Shri Brij Mohan, a relative being the father's brother's son, of each of Shri Krishan Mohan and Suresh Mohan, Directors of the Company, holding an office or place of profit under the Company, namely, as the Deputy Finance Manager at the company's head office at New Delhi for a period of five years with effect from the.....day of..... 19.....and on the terms and conditions contained in an agreement dated the.....day of.....19.....entered into between the Company and Shri Brij Mohan.

Explanatory statement in the context of this resolution : Section 314 of Companies Act, 1956, prohibits, *inter alia*, a relative of a director from holding any office or place of profit under a company except with the previous consent of the Company accorded by a special resolution. Shri Brij Mohan, a relative, being the father's brother's son of each Shri Krishna Mohan and Shri Suresh Mohan, Directors of the Company has been appointed as the Deputy Finance Manager at the Company's head office at New Delhi for a period of five years with effect from.....on the terms and conditions contained in an agreement dated.....entered into between the Company and Shri Brij Mohan. The salient terms of the agreement are as follows :—

(To be filled in)

Basic Salary.... .....

Dearness Allowance.....

Provident Fund.....

Accommodation.....

Leave.....

Other Perquisites.....

The agreement also specifies the rights and obligations of the Company and Shri Brji Mohan and includes administrative detail.

Your consent to Shri Brij Mohan's holding of the said place of profit is needed. A copy of the agreement is available for inspection at the registered office on any working day during normal office hours up to and including the day of the annual general meeting and will be available for inspection at the meeting.

Shri Krishna Mohan and Shri Suresh Mohan who are the Directors of the Company being relatives of Shri Brij Mohan, may be deemed to be interested in the relevant resolution.

(18) (b) "Resolved that the Authorised Share Capital of the Company be increased from Rs. 1,00,00,000 divided into 1,00,000 shares of Rs. 100, each to Rs. 2,00,00,000 divided into 2,00,000 shares of Rs. 100 each by the creation of 1,00,000 additional shares of Rs. 100 each ranking *pari pasu* with the existing shares in the Company."

Explanatory Statement pursuant to Section 173 of the Companies Act regarding the above resolution : With 50% of the subscribed capital being held by two Public Financial Institutions, (on presumption) the entire issued capital, and incidentally the entire Authorised Share Capital has been subscribed for. The Company now needs to increase its Authorised Share Capital from Rs. 1 crore to Rs. 2 crores for implementation of its expansion schemes. The Directors will take appropriate steps to issue the shares if the increase in the authorised capital, as proposed, is adopted.

(19) *Resolution for the issue of rights shares under section 81* :

Resolved that 8,00,000 Equity Shares of Rs. 10 each in the authorised capital of the Company be and are hereby issued by the Company and pursuant to Section 81(1A) of the Companies Act, 1956, the Board of Directors of the Company be and is hereby authorised to offer the said shares for subscription for each at a premium of Rs. 10/- per share payable (as to subscription and premium) in full, on application, to the person whose names appear in the register of members as the holders of the existing Equity Shares of the Company as at July 1, 1977 in the proportion as nearly as circumstances admit of one new Equity Share for every three issued Equity Shares registered in their names on the said date, fractions of a new share being disregarded, and on such terms and conditions as are prescribed in Section 81 (1) (b), (c) & (d) of the Companies Act, 1956, and on such other terms and conditions (including the right to be given to the persons concerned who take up

their rights shares to apply for additional shares so that any shares not taken up as rights or available from fractions which have been disregarded may be allotted to the applicants for additional shares) as the Board of Directors may deem fit and it is expressly provided that the said 8,00,000 new Equity Shares shall in all respects rank *pari passu* with the existing Equity Shares except that they will not participate in the interim distribution of dividend in respect of the year ending June 30, 1976 which was declared by the Board of Directors on April 4, 1977 and the Board of Directors be and is hereby authorised to take all such steps for the implementation of this resolution as it may think necessary or expedient.

(20) *Board Resolution for opening a Bank Account* :

Resolved that a current account be opened with the State Bank in their branch at Parliament Street, New Delhi in the name of the Company and the said bank be authorised to pay all cheques and bills of exchange signed by any two of the four undermentioned Directors of the Company, whose specimen signatures had been furnished to the bank in the appropriate forms.

1. .....
2. .....
3. .....
4. ....., and that each of them is hereby authorised to endorse on behalf of the Company all cheques, bills of exchange, and other negotiable instruments lodged for collection to the credit of the Company's account.

(21) *Board Resolution for the appointment of the First Auditors* :

Resolved that pursuant to Section 224(5) of the Companies Act, 1956, Messrs. Gupmal & Co., Chartered Accountants of 6, Asafali Road, New Delhi be and they are hereby appointed auditors of the Company to hold office until the first annual general meeting of the Company at a remuneration of Rs. 20,000 per annum.

(22) *Board Resolution authorising the grant and execution of Power of Attorney* :

Whereas it is necessary to appoint an attorney to sign all short-term labour contracts and also to appint and dismiss staff for loading and unloading jobs at the Company's Faridabad works, it is.....

Resolved that a power of attorney in the form of the draft submitted to this meeting and initialled on the first page by the chairman for identification be granted in favour of Shri Ashok Saxena, the works superintendent, the common seal be fixed on the stamped endrosement thereof and the same be signed by Shri P.C. Nanda, a director of the Company and countersigned by the Secretary.

(23) *Board Resolution authorising allotment of shares and issue of share certificates* :

Resolved in pursuance of the Rule 4 of the Companies (Issue of share

Certificate) Rules, 1960, that the Secretary be and is hereby authorised to register the names of the allottees who have paid the amount payable on allotment as per the application and allotment sheets numbered.....to....., inclusive, submitted to the meeting and signed by the Chairman thereof for the purpose of identification, and issue share certificates numbered.....to..... inclusive under the common seal of the company in respect of the equity shares numbered.....to.....inclusive issued to the allottees thereof, on their surrendering to the Company its letters of allotment.

(24) *Board Resolution delegating certain powers comprising normal activities of the company to a Committee of Directors in pursuance of its articles (This does away with the necessity for frequent Board meetings)* ;

Resolved that pursuant to Article 26 of the Articles of Association of the Company, a Committee of Directors consisting of Shri D.K. Roy and Shri M.K: Gulati and failing them Shri V.K. Bhushan and Shri N.C. Ganguly be formed with a view to expeditiously carrying on the day-to-day operation of the Company's affairs including, *inter alia*, exercise by that Committee, subject to such restrictions, limitations or conditions as may be imposed by the Board of the following powers :

(a) To acquire for the Company any property, rights or privileges which the Company is authorised to acquire and on such terms and conditions as the Committee may think fit, subject to a limit of rupees one lakh for each such transaction.

(b) To sell, let, exchange or otherwise dispose of absolutely or conditionally any part of the property, privileges and undertaking of the Company upon such terms and conditions and for such consideration as the Committee may think fit subject to a limit of rupees one lakh for each such transaction.

(c) To appoint and remove or suspend agents, managers, officers, clerks and servants for such services of the Company as the Committee may from time to time think fit and determine their powers and duties and to fix salaries or emoluments not exceeding Rs. 3000 per month.

(d) To determine who shall be entitled to sign on behalf of the Company bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts and documents.

(e) To affix the common seal of the Company to any documents, share certificates and debenture certificates required to be executed under the common seal of the Company and have such documents signed by a Director who may be a member of the Committee and countersigned by the Secretary.

(f) To approve of and pass transfer, transmission, renewal, sub-division and consolidation of shares in and debentures of the Company and authorise entry of names in the register of members of the Company.

Resolved further ;

That the Committee of the Board may convene its meetings at such intervals as it may consider necessary and may determine the quorum necessary for transaction of business and that until otherwise determined, one member of the Committee shall be the quorum and if in any matter the members present consider it necessary to refer the matter to the Board, the matter may be referred to the Board of Directors for decision.

Resolved further :

That pursuant to the provisions of Article 24 of the Articles of Association of the Company, each member of the Company shall be paid out of the funds of the Company by way of remuneration for his services the sum of Rs. 150/- for each meeting of the Committee attended by him.

Resolved further :

That in accordance with Article 36 of the Articles of Association of the Company, the Committee shall cause minutes of its meeting to be duly entered in books provided for the purpose and that all such minutes shall be placed before the next meeting of the Board for consderation and approval and for further directions of the Board as may be given in any matter.

25. *Incorporation of a new article into the article of association providing for appointment of Nominee Director by Public Financial Institutions approached for loan* : The addition of a new article to the articles of the Company in question would be tantamount to the alteration of articles, which can be effected only by means of a Special Resolution in pursuance of Section 31 of the Companies Act. Since this matter would be a special business, an explanatory statement under Section 173 of the Act has to be attached to the notice convening a general meeting for the said purpose. The draft resolution may be as follows :

As a Special Resolution :

"Resolved that, subject to the approval of the Central Government under Section 268 and other provisions of the Companies Act, 1956, if any applicable, a new Article 58A be incorporated into the Articles of Association of the Company after article 58 to read as follows :

"58A. Despite anything to the contrary contained in these articles, as long as any moneys advanced to the Company by the Industrial Development Bank of India or the Industrial Credit and Investment Corporation of India or the Life Insurance Corporation of India or the Unit Trust of India or the Industrial Finance Corporation of India or any other corporation or company or body corporate which may be designated by the Central Goverenment as a Public

Financial Institution (each of which is hereinafter referred to as "Financial Institution") remain due and owing by the company to all or any of such Institutions, or as long as the Public Institution holds shares in the Company in consequence of conversion of the said loans/debentures, the Financial Institution shall have a right to appoint, from time to time, one or more persons as director(s) on the Board of Directors of the company [such director(s) being referred to herein as "Nominee Director(s)"]. It shall not be obligatory for such Nominee Director to hold qualification shares, nor shall he be liable to retire by rotation. At any time and from time to time, the Financial Institution may remove the Nominee Director; also it may fill in any vacancy following in the wake of such removal or death or resignation of such Nominee Director by appointing in his stead any other person as Nominee Director. The Board of Directors of the Company shall be bereft of any power to remove a Nominee Director from office, the discretion in his behalf being entirely in the hands of the nominator. Each such Nominee Director shall be entitled to attend all general meetings, Board meetings and meetings of the Committee of which he is a member; he and the Financial Institution appointing him shall also be entitled to receive notice of all such meetings as well as the minutes of all meetings—general or otherwise. The Nominee Director shall be paid all remunerations, fees, allowances, expenses and other moneys to which other directors are entitled. Subject as aforesaid, the Nominee Director shall be entitled to the same rights and privileges, and save and except as otherwise provided for in the Industrial Development Bank of India Act, the Industrial Credit and Investment Corporation of India Act, the Life Insurance Corporation Act, the Unit Trust of India Act, the Industrial Finance Corporation of India Act be subject to the same obligations as any other director of the company. The Nominee Director shall *ipso facto* vacate his office immediately the moneys owed by the Company to the Financial Institution are paid off or on the Financial Institution ceasing to hold shares/debentures of the Company."

(26) *Resolution for Approval of Accounts*

"Resolved that the draft Balance Sheet as at 31st December, 1978 and the Profit and Loss Account for the year ended 31st December 1978 along with the annexures thereto as initialled by the Chairman be and are hereby approved and that Shri.....Managing Director, Shri.....Director and Shri.....Director of the Company be and are hereby authorised to sign the same on behalf of the Board of Directors and submit to the auditors for their report thereon."

(27) *Resolution for Allotment of bonus shares*

"Resolved that pursuant to the resolution of the company for the capitalisation of reserves, passed at the.....General Meeting of the company held on.....under Article.....of the Company's Articles of Association, the sum of Rs.....out of the reserves standing to the credit of General Reserve Account in Company's books be and is hereby appropriated to the equity shareholders and be applied in paying up in full.....unissued equity shares of Rs.....each of the company for the allotment and distribution by way of capitalisation of the reserves to and among the holders of the equity shares of the company as appear on.....in the Register of Members in proportion of.....equity shares for every equity share of Rs.....held there by transferring the said sum of Rs.....from General Reserve Account to Share Capital Account.

"That the necessary entires to this effect be made in the Company's books and accounts accordingly.

"That the said equity shares numbered from.....to.....inclusive be allotted to the shareholders as per the list, initialled by the Chairman for identification, credited as fully paid up and by way of capitalisation of reserves in accordance with the said resolution."

"Resolved further that the common seal of the company be affixed to the share certificates in the presence of Shri.....and Shri....."

"Resolved further that the necessary entries be made in Register of Members, Share Certificate Register and the other books as required by the Companies Act, 1956 and the Companies (Issue of Share Certificates) Rules, 1960."

"Resolved further that the Secretary be directed to file with the Registrar of Companies a Return of the shares allotted as aforesaid in accordance with Section 75 of the Companies Act, 1956".

Control of Capital Issues : Under the Capital Issues Control Act, 1947 all companies are required to obtain the approval of the Controller of Capital Issues for issue of bonus shares. The detailed guidelines for the examination of such applications are indicated below for the guidance of companies seeking approval under the Capital Issues Control Act, 1947 :

(1) There should be a provision in the Articles of Association of the company for capitalisation of reserves, etc. If not, the company should produce a resolution passed at the General Body Meeting making provision in the Articles of Association for capitalisation.

(2) Consequent upon the issue of bonus shares if the subscribed and paid-up capital exceeds the authorised capital, a resolution passed at the General Body Meeting in respect of increase in the authorised capital is necessary.

(3) The company should furnish a resolution passed at General Body Meeting for bonus issue before an application is made to the Controller of Capital Issues. In the General Body resolution, the management's intention regarding the ratio of dividends to be declared in the year immediately after the bonus issue should be indicated.

(4) The bonus issue is permitted of free reserves built out of genuine profits or share premium collected in cash only.

(5) Reserves created by revaluation of fixed assets are not permitted to be capitalised.

(6) Development Rebate Reserve is considered as a free reserve for the purpose of calculation of residual reserves test and is allowed to be capitalised.

(7) The residual reserves after the proposed capitalisation should be at least 33-1/3% of the increased paid up capital.

(8) The capital resumption reserve, if any, existing in the company, will not be included in computing the minimum reserves of.33-1/3%.

(9) All contingent liabilities disclosed in the audited accounts which have a bearing on the net profits, shall be taken into account in the calculation of the minimum residual reserves of 33-1/3%.

(10) 30% of the average profits before tax of the company for the previous three years should yield a rate of dividend on the expanded capital base of the company at 9%.

(11) Declaration of bonus issues in lieu of dividend is not allowed.

(12) Not more than two bonus issues will be allowed to a company over a period of 5 years.

(13) Between two successive announcements of bonus issues by a company, there should be a time-lag of at least 24 months.

(14) The company may make further application for issue of bonus shares 12 months after the scrip in respect of last bonus issue is listed (if the company's share is quoted on Stock Exchange) or after the completion of the despatch of share certificates.

(15) Bonus issues are not permitted unless the partly paid shares, if any, existing are made fully paid up.

(16) In the case of composite proposals for issue of right shares and bonus shares, the bonus issue application will be sanctioned first and then the rights issue after some time-lag.

(17) Capital reserves appearing in the balance sheets of the companies as a result of revaluation of assets or without accrual of cash resources will neither be allowed to be capitalised nor taken into account in the computation of the residual reserves of 33-1/3% for the purpose of bonus issue.

(18) At any one time, the total amount to be capitalised for issue of bonus shares out of free reserves shall not exceed the total amount of paid-up equity capital of the company.

(19) A certificate should be furnished from the auditors of the company that adequate provision for depreciation has been provided in the accounts of the company as allowable under the Income Tax Act.

(20) If there is a charge in the method of depreciation, the companies should further ensure that adequate provision for deferred taxation liability is made and the auditor's certificate to this effect should also be furnished along with the application for bonus issue.

Note : All applications for bonus issue be signed by a person not below the rank of a director together with a certificate indicating that the information furnished is true and correct and that all the data required in the application form and Guidelines have been furnished.

A certificate from the auditors of the company indicating that the Guidelines for the issue of bonus shares prescribed by the Government from time to time are fully met by the company for the issue of bonus shares and that all data furnished in the application is true and correct to the best of their knowledge and information. (Issued by Controllor of Capital Issues on 2nd March, 1974).

Statutory Books : In the study paper on Accounting and Auditing, the titles of various books required to be kept by companies for recording their financial commitments and engagements are stated. These are known as statutory books, since these are required to be kept according to the provisions of law.

Particulars of the statutory books *other than the books of account* and the information that should be recorded in each of them are given below :

(1) *Register and Index of Members* : It is a record of the names, addresses and occupations of members as well as that of particulars of shares held by them (Section 150). If the number of members exceeds 50, the register should have an index, unless the register itself is kept in such a form as to constitute an index of the entries contained therein (Section 151).

(2) *Register and Index of Debentureholders* : It is a record of the particulars of debentures, similar to that of members. This also should have an index when the number of debentureholders exceeds 50, unless the register itself constitutes an index (Section 152).

(3) *Minute Books :* It is one containing a record of proceedings of the meetings of directors and shareholders (Section 193). These are open to inspection of Members (Section 196).

(4) *Register of Directors, Managing Director, Manager and Secretary* : Under the provisions of Section 303 of the Companies Act, it is obligatory for a company to maintain a record in a register, of the names and addresses and that of other particulars, relevant for the administration of the Act, in respect of the officers aforementioned. Under sub-section (2) of the Section, any change in the officers or in any of the particulars of an officer is to be incorporated in the register and notified to the Registrar within 30 days of the happening of the change.

(5) *Register of contracts, companies and firms in which director or directors are interested* : It contains a record of the particulars of all contracts arrangements to which provisions of Section 297 or Section 299 is applicable. Apart from particulars of contracts, a record is also kept of the dates of Board Meetings in which the contracts were approved and that of the names of directors who voted for or against the proposal. The Register also discloses the names of the firms and bodies corporate in which directors are interested and of which notice has been given by each director under sub-section (3) of Section 299 (Section 301).

(6) *Register of charges* : It contains details of all charges, specifically affecting the property of the company and all floating charges on the undertaking or on any property of the company which is required to be registered (Section 143).

(7) *Register of Directors' shareholdings* : It is a record of each director's shareholding or debentureholding. It contains particulars of shares or debentures (held by such persons) of the company or any other body corporate which is a subsidiary or holding company or subsidiary of the company's holding company, which are held by a director or in trust for him or of which he has any right to become the holder whether on payment or not (Section 307).

(8) *Register of loans of companies under the same management* : Sub-section (ID) of Section 370 demands that within three days of making of a loan, the lending company shall enter particulars of the loan made, guarantee given, or security provided, in a Register referred to in Sub-section (1C) which will be kept at the registered office of the company and will be open to inspection. The register is maintained pursuant thereto.

(9) *Register of investment not held in company's name* : According to sub-section (7) of Section 49 where any shares or securities in which investment have been made by the company are not held by it in its own name, the particulars of such investments shall be forthwith entered in a register specially maintained by the company for the purpose.

(10) *Register of investments made by a company in shares and debentures of other companies in the some group* : According to sub-section (7), particulars of every investment to which provisions of sub-section (6) of Section 372 are applicable are required to be entered in a register, within 7 days of making thereof. A record thereof is kept in the register aforementioned.

Significance of Secretary's signature on Annual Accounts– Limitation to his responsibility as the signatory : Section 215 (1) (ii) of the Companies Act requires the signature of manager or secretary (if any) and at least 2 directors one of whom shall be the managing director where there is one, on the balance sheet and profit and loss account (i.e., annual accounts) of a company other than a banking company. The signature of the secretary on behalf of the company is tantamount to an authentication of the annual accounts and 'authentication' means a certificate of an act being in due form of law, given by proper authority. The responsibility for the preparation of the accounts belongs to the directors and they are compelled by the Section to recognise this responsibility by considering the accounts and approving them before they hand them over to the statutory auditor of the company. Since the secretary is the servant of the company and it is not possible for the directors to look into the day-to-day affairs of the company, the Board delegates to him the ministerial and administrative work involved in the preparation of the accounts. In this capacity, he is also compelled by Section 215 to shoulder the responsibility in this regard. These safeguards are necessary to ensure the authenticity of the accounts and to prevent the shareholders, creditors on the general public from being duped by so-called balance sheet and profit and loss account which do not comply with the provisions of the Act.

If the accounts are signed by the secretary, it would proclaim that the company is bound by them (except so far as the shareholders in the annual meeting

may effect a change). The signing of the accounts would appear to be at par with the secretary signing documents requiring the affixing of the company's seal. The secretary is not personally liable; his signature proclaims the company's responsibility.

It has been held in *Jarvani Press Ltd. In re, (1966) I Comp. L.J. 327* that the balance sheet bearing signatures of directors can be used as admission made by them and proved against them under Section 21 of the Evidence Act, 1872. It seems that this will hold good even in the case of the secretary who is a co-signatory with the directors. The contravention of the provisions of Section 215 renders, under Sectiod 218, the company and every officer of the company, who is in default, punishable with the fine which may extend to Rs. 500. Under Section 2(30), secretary is an officer of the company. The secretary would be construed as an officer who is in default under Section 5, if he is guilty of the default, non-compliance, failure, refusal or contravention mentioned in a particular provision (in this case the provision of Section 215) or if the knowingly and wilfully authorises or permits such default, non-compliance, failure, refusal or contravention. Consequently, the secretary as the signatory will be punishable as aforesaid.

As regards the responsibility of the secretary in regard to the annual accounts of the company, the question will clearly be answered by reference to the responsibilities specifially fixed upon him by the Board of Directors in addition to those laid on him by the Statute. Unless the Board of Directors makes him responsible for the maintenance of the accounts, it would appear that his responsibility would be confined to the following:

(i) Safe custody of the books of account and their being kept at the registered office of the company or any other place, as allowed by Section 209;

(ii) Seeing, as far as practicable, that the accounts are ready for consideration by the Board of Directors for their approval in appropriate time;

(iii) Informing the auditors of the avilability of the accounts for audit and making all arrangements for the auditors to complete their work in time;

(iv) The accounts being ready, bringing them before the Board of Directors and after getting them approved by the Board, forwarding them to auditors for their report (Section 215);

(v) Making arrangements for the annual general meeting to be held within the scheduled time allowed by the Companies Act to consider the annual accounts;

(vi) Circulating the accounts along with the notice of the annual general meeting among the shareholders in compliance with provision of the Act (Section 219).

As officer of the company, he would be culpable under the Companies Act for his negligence in the matter of the discharge of the duties mentioned above. However, it is to be understood that the secretary always works under instructions of the Board of Directors. Therefore, if he is able to show that he was not able to perform any of his duties because of decision of the Board of Directors, or lack of decisions concerning his work, he would not be held responsible.

Books of accounts to be kept: The books of account required to be kept by a company are those books which, according to Section 209 (1), relate to (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place ; (b) all sales and purchases of goods by the company ; (c) the assets and liabilities of the company. In the case of a company belonging to any class of companies engaged in production, processing, manufacturing or mining activities, the company may be required, by Government order issued in respect of the class of companies to which the company belongs, to maintain books, in addition to the aforesaid books, showing particulars relating to (i) utilization of material or (ii) labour or (iii) other items of cost as the Central Government prescribes.

Under Section 541 (2), it shall be deemed that the proper books of account have not been kept if there have not been kept ; (a) such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day to day in sufficient detail of all cash received and paid ; and (ii) where the business of the annual stock-takings and (except in the case of goods sold by way of ordinary retailed trade) of all goods and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified.

Where these to be kept: The books of account are to be kept by a company at its registered office. However, the Board of Directors may decide, by a resolution, to keep any or all of the books of account at any other place in India ; pursuant to this decision of the Board, the company shall within 7 days of the decision, file with the Registrar a notice in writing giving the full address of that other place. A company having a branch office (within or without India) may maintain such books of account at its branch in respect of the transactions effected there but proper summarised returns should be sent at least quarterly to the registered office or to the other place where the Board has decided to keep the books of account.

For the purposes Section 209 (1) and (2), proper books of account shall not be deemed to be kept with respect to the matters specified therein, if there are not kept such books as are necessary to give a true and fair view of the state of the affairs of the company or branch office, as the case may be, and to explain its transactions.

Persons eligible to inspect books of account : The following are the persons who can inspect these books, namely (i) any director during business hours [Section 209 (4)]; (ii) the Registrar of Companies, during business hours [Section 209A (1) (i)] ; (iii) such officer of Government as may be authorised by the Central Government in this behalf [Section 209A (1) (ii)] ; and (iv) every auditor of a company under Section 227 (1).

SELF EXAMINATION QUESTIONS

These questions are intended to enable the student to test his knowledge before proceeding to answer the test paper. Answers to these questions are not required to be written out and submitted for evaluation. Answers are given at the end

1. A secretary of a company can be appointed (a) only in the ordinary way through a posting of a letter of appointment (b) only by the articles of company (c) by either of the methods. State which is correct.

2. If the secretary is not appointed by the articles of the company, his appointment (a) should be, (b) should not be confirmed at the first meeting of Board. State which is correct.

3. Are the following statements correct ?

   (i) The articles of association can be altered only by an ordinary resolution.

   (ii) The alteration should not have effect of introducing an illegial provision or of bringing the articles into conflict with any of the provisions contained in the memorandum of association.

   (iii) The alteration may, in compelling circumstances, contravene some provisions of the Companies Act.

   (iv) An alteration in the articles, having the effect of a converting a public company into a private company, requires no approval of the Central Government.

   (v) An alteration, casting, in effect, an additional financial obligation on members, shall not be binding upon them unless the members'

written has been obtained before or after the passing of the resolution.

4. What is the rate of discount at which the shares may be issued ?
5. Whose sanction is necessary for the issue of shares at a discount ?
6. Can the annual general meeting of a company be held after the business hours on a working day ?
7. The registered office of a company is at Asaf Ali Road. Can it hold its annual general meeting in Connaught Place, (b) in Meerut ?
8. An extraordinary general meeting can be called by giving a shorter notice than what is statutorily required if (a) all the members entitled to vote consent to it (b) the members holding 95% of the total voting rights consent to it. State which is correct.
9. The agenda, copy of the balance sheet and profit and loss account, directors; report and proxy from (a) must be attached to the notice of the annual general meeting (b) may be sent subsequent to the said notice. Which is correct ?
10. Suppose the agenda of an annual general meeting includes an item which is "special". What must the Secretary do in the circumstances ?
11. The instrument appointing a proxy is to be lodged with the company (a) within 24 hours, (b) within 48 hours, (c) within 72 hours, of the meeting. State which is correct.
12. What is the quorum for the meeting of a public company ?
13. What is the quorum for the meeting of a private company ?
14. What is the quorum for the meeting of a private company which is deemed to be a public company under Section 43A ?
15. Can the shareholders normally declare a larger dividend than that has been recommended by the Board ?
16. Four directors have been re-elected at the meeting through one single resolution. Is the election proper ?
17. The Secretary of a company receives the nomination papers for the appointment of a person as director, other than the retiring director 10 days before the date of a meeting. Can he reject the papers ?
18. The extra-ordinary general meeting of a company having a share capital can be called on the requisition of holders of not less than (a) 3/4ths, (b) 3/5ths, (c) 1/10th, of the paid-up capital carrying voting rights at the date of the requisition. State which is correct.

19. If the directors do not convence the meeting on the requisition, can the requisitionists themselves call it ?

20. Can the Directors call an extraordinary general meeting of a company ?

21. If for any reason it is not practicable to call the extraordinary general meeting in the useful manner, what course is left for the directors or, as the case may be, the members of the company ?

22. Is it necessary that at an extraordinary general meeting the resolutions which are to be passed must be special resolutions ?

23. If the person behaves improperly in the meeting and refuses to listen to the admonition of the chairman, can the latter have the former turned out ?

ANSWERS :

1. (c); 2. (a); 3. (i) No; 9. (ii). Yes; 9. (iii). No; 9. (iv). No; 9. (v) Yes; 4. any rate not exceeding 10%—in case. It exceeds. Company Law Board's sanction necessary ; 5. Shareholders, and Company Law Board's ; 6. No ; 7 (a) Yes ; 7 (b). No ; 8. (b); 9. (a); 10. Send an explanatory statement ; 11. (b); 12. 5 member's; ⅓ of the total strength or 2 directors whichever is higher; 13. 2 members; 14. 2 members ; 15. No; 16. No; 17. Yes; 18. (c); 19. Yes; 20. Yes; 21. To move the court for the purpose; 22. No; 23. Yes.

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F. IIIA-14

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

STUDY MATERIAL F.S.P. (N) Sec. Pr.-2 (Combination-A)

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FINAL COURSE (N)

SECRETARIAL PRACTICE

STUDY II

Contents :

Drafting and Preparation of Reports—Chairman's speech – Specimen reports.

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Stock exchange regulations and dealings thereat.

Procedure for borrowing loans from financial institutions.

Prescribed Readings :

1. *A Manual of Secretarial Practice*—By S N. Sarkar
2. *Secretarial Practice in India*—By J.C. Bahl (Tenth Edition)
3. Application to the Central Government under the Companies Act, Capital Issues (Control) Act, MRTP Act, Industries (D & R) Act — By Shanbhogue & Das Gupta.

COMPANY CORRESPONDENCE & REPORTS

Drafting and Preparation of Reports

A report is a statement containing an assessment of a situation and/or facts and data relevant thereto It is based on one's knowledge and a systematic study of the situation. For example, the Marketing Manager may prepare a report on the decline of sales in a particular area. The report may or may not contain comments or conclusions of the writer. It is intended to enable the interested persons to form their judgment and to take suitable action thereon.

The success of a reporter depends upon the extent of his knowledge of the matter reported on, his capacity to pick out from the mixed facts and figures the important, significant and relevant ones, the ability to marshall the facts with lucidity, his capacity to see the picture as a whole and above all, his ability to think logically. Preparation of a variety of statutory and non-statutory reports falls within the domain of the company secretary.

With reference to the Companies Act, the following are some of the important statutory reports :

(a) Statutory report prepared under Section 165 and sent to the members along with the notice of statutory meeting as well as to the Registrar of Companies.

(b) Auditors' report placed before the annual genneral meetine.

(c) Directors' report placed before the annual general meeting.

(d) Annual returns submitted by the company to the Registrar. The returns as regards allotment, statement in lieu of prospectus too are in the nature of reports.

(e) Inspector's reports submitted after investigating into the affairs of the company concerned.

(f) Registrar's report relating to unsatisfactory affairs of a company.

(g) Liquidator's report in winding-up proceedings.

Non-statutory reports, though beyond legal requirements, are nonetheless compiled in special circumstance by a director, secretary or accountant, committee or sub committee or a special body with a view to aiding authorities in taking decisions. The following are some of the non-statutory reports :

(a) Report of a committee of directors to be submitted to the Board after enquiring into the exigencies of the business situation.

(b) Report of the Board of Directors to shareholders, beyond the legal requirements.

(c) Chairman's speech at the annual general meeting.

(d) Reports of special committees—standing or ad hoc—constituted by the Board, e.g, finance committee report, share allotment committee report, project committee report, etc. The reports of the ad hoc committee may relate to a special problem such as opening or closing a branch office, raising of additional capital, introduction ot certain office routine or method, etc.

(e) Report to Stock Exchange.

(f) Circular reports issued to customers, clients and general public.

(g) Report of individual experts, or departmental managers or officers of the company such as secretary, accountant, commeacial manager, sales manager, works manager, personnel manager and the like.

General hints on drafting non-statutory reports : Reports are too numerous to be governed by precise rules. However, a few general hints for drafting them are given below :

(a) Collection of material or data being the foundation on which the report stands; the write. must collect them by referring to office records, interviewing people, visiting different places etc., as may be necessary.

(b) The material collected as aforesaid has to be marshalled in a logical sequence so that the report, when made out, may read like a narrative.

(c) The report should have a heading and a preface explaining its purpose and nature.

(d) Its language has to be simple, clear and unequivocal. Short sentences are to be preferred to long ones. It should be drafted in an impersonal manner, making use of 'third person'.

(e) If the report is likely to be lengthy. it should be divided into parts and appropriate sub headings should be used. The report must then contain a summary also Many people adopt the practice of giving the gist in one page and the matter in detail later in the report.

(f) Where the directors are not technical persons, technical phraseology should be eschewed, yielding place to plain and simple phraseology, the idea being to make the report, as far as practicable, easily understandable by those for whom it is meant.

(9) The conclusions put forward should be founded on the material or data collected; also these should be unbiased in character.

Preparation of a report : This task calls for the consideration of the following points :

(1) **Data :** The writer must have unhindered access to the subject-matter to be reported on, should collect evidence as regards facts and figures, raise questions as a true enquirer and then analyse the facts carefully and marshall them in a logical sequence.

(2) **Nature and purpose :** The main purpose or object of the report needs to be clearly brought out; it must not get eclipsed.

(3) **Form and arrangement of the data :** The report of committees and sub-committees should be in impersonal form like "It is observed". An individual's reports are usually set out in personal form like "I find.....".

Arrangement should receive particular attention. The following order is recommended: (i) Title of the report indicating the object or contents; (ii) Table of content with serial numbers, page marks, etc. ; (iii) Body of the report arrang... in paragraphs, sections or sub-sections containing (a) introduction, ; (b) full data or facts which may include statistics, charts, etc. ; (c) summary and conclusion; (d) opinion and recommendation or proposals, ; (e) references ; and (f) signature.

The division of the body of the report into several sections should be accompanied by a suitable heading for each section Succinct notes may also be given under each heading so as to facilitate the management to grasp the subject-matter quickly. It would be advisable to insert marginal notes and marginal headings in appropriate cases.

In a nutshell, the arrangement and display of a report should be such that one should not be required to spend too much time in grasping the essence of the report.

(4) **Language, Style and Presentation :** Language and style would depend upon the subject-matter of the report as well as on the personality of the writer. Be that as it may, clarity, conciseness and logical sequence - the three desiderata of a report—demand that the report should be written in a simple, convincing and positive style. There should be no ambiguity: brevity, lucidity and accuracy being the chief attributes of an ideal report, metaphors and cliches should be avoided. Business phraseology usually employed in the particular subject-matter and form of the report should be used.

Presentation demands a coherent picture unsurcharged with any emotion or prejudice. The layout and general impression are also important. Neatness and a pleasant look add to the utility of the report.

(5) **Statutory requirements,** if there be any, must be complied with.

(6) **Signature and date :** The report has to be signed and dated by the maker or makers thereof. In the case of a committee report, it must be signed by all the members of the committee. In the case of non-availability at the appropriate time of the signature of any signatory, the reasons therefor should be recorded. Where there is any divergence of opinion, dissenting notes may be added.

Chairman's Speech

It is usual for the chairman of a company to make a speech at the opening of meetings. This speech is generally prepared in advance by the secretary of the company In his speech, at the annual general meeting, the matters dealt with in the Directors Report are amplified. It is usual for the chairman to deal not only with the business of his own company but also with the industry as a whole in order

to give the shareholders an idea of the position of their own company within the industry Further, he may also elaborate on government's policy towards the industry and how it favourably or adversely affects the company's business. As the annual general meeting is held after a few months from the close of the company's financial year, the chairman may, on the basis of the available information, touch on salient developments since the close of the year as well as the prospects of the company for the coming year.

The salient features of chairman's speech are as follows :

(1) It is basically a resume of the Directors' report.

(2) It touches succinctly on the profits of the company and also mentions the various ways in which such profits are to be disposed of.

(3) It draws up a comparison with the immediately preceding year's performance both as regards turnover and profits. It should also explain the factors affecting the current year's performance in the background of developments in the national economy.

(4) It has to make a brief reference to the salient developments - economic or political—occurring during the intervening period between the closure of the financial year of the company and the date of the annual general meeting as well as to the future prospects of the company.

(5) It dwells upon the problems, for instance, governmental and industrial, that have been faced by the company during the year under review.

(6) The staff, customers, clients, etc., are customarily thanked.

Chairman's Speech v. Director's Report: Although the chairman's report or speech contains the resume of the Directors' report it is much different from the latter in contents. In the former case, there is no legal prescription, whereas in the latter case, the contents must be in conformity with the requirements of Section 217 of the Companies Act. Accordingly, the directors' report must contain: (a) a brief idea as to the company's state of affairs; (b) the amount proposed to be carried to any reserve fund; (c) the amount proposed to be paid by way of dividend ; and (d) any material changes or comments affecting the financial position of the company, which have occurred between the end of the financial year of the company to which the balance-sheet relates and the date of the report. All these matters are invariably to be dwelt upon in detail in the directors' report, whereas in the chairman's speech or statement, these matters are, though not under any legal compulsion but nonetheless under convention, briefly touched upon by way of a passing reference.

Besides, there are various other matters which must compulsorily find place in the directors' report but not in the chairman's statement or speech e.g., changes occurred during the financial year in respect of nature of company's business, company's subsidiaries or nature of business carried on by them and the classes of business in which the company has interest provided the furnishing of this information is not harmful to the company or its subsidiaries, a statement showing the names of such employees as receive an annual remuneration of Rs. 36,000 and

above during the whole year or Rs 3,000 and above per month (when employed for less than a year) together with their designations; actual remuneration received, nature of employment and other terms, nature of duties, qualifications and the dates of commencement of their employment. Information on the matters mentioned above has to be given in the report itself, or, in cases falling under the proviso to Section 222, in an addendum to that report, on every reservation, qualification or adverse remarks contained in the auditor's report.

Again, the directors' report contains a reference to the fact that certain directors and the auditor retire and, being eligible for re-election or re-appointment seek the same The chairman's speech or statement does not usually contain any such reference.

In practice the directors' report goes much beyond the strict legal requirements and throws light on the company's policies in regard to production, marketing, research and development, etc. In the case of progressive companies, the directors' report always goes much beyond the legal requirements The report often touches upon the problems and prospects of the company and shows up the significance of various national and international events, both economic and political. Thus, the Board's report is a composite document containing both financial and other useful information. The public sector corporations have given a commendable lead in this regard, though many of the progressive private sector managements have also not shied from giving worthwhile information to the shareholders.

Media of communication between a company and its shareholders: The two foremost media of communication between a company and its shareholders are the statements of account and the directors' report [As regards *directors' report*, see the discussion above] Section 210 makes it obligatory for the Board of Directors to lay before the annual general meeting of the company a balance sheet as at the end of the period and a profit and loss account for that period. Where a company does not carry on business for profit, an income and expenditure account shall have to be laid before the annual meeting The function of the balance sheet is to show the share capital, reserves and liabilities and the manner in which the total moneys representing them are distributed over the several types of assets. As required by Section 211 of the Act, every balance sheet must give a true and fair view of the state of affairs of the company as at the end of the financial year. Similarly, the profit and loss account must give a true and fair view of the profit and loss of the company for the financial year. For the purpose, the two statements must be drawn up asper Parts I and II respectively of Schedule VI to the Companies Act. The amendments made in this Schedule from time to time, necessitated by the information-need of the Government or the public, provide for disclosures to a very large extent. A special feature of the Schedule is its requirements as to disclosure of non-financial information.

The aforesaid media afford the shareholders an insight into the profitability, reserves position, indebtedness position, liquidity including cash generating capacity of the company and dividends This information is not deemed, according to the present-day thinking, to be sufficient of or various classes of user thereof, because of the concept of social responsibility of the corporate sector and also because these

media do not provide future projections which are highly desired. Financial statements havs their limitations, e.g., due to management's choice of various accounting policies regarding valuation of inventory, depreciation, provisions for gratuity, treatment of research and development expenditure, etc. ; differing interest of different users like proprietors or shareholders, workers, investors, creditors, financial analysts, academicians, etc., rendering it difficult to draw up one set of financial statements that will be equally useful to all the parties ; quantitative factors translated in terms of money being the only factors revealed in the statements (including of course quantities for sales, purchases and stocks). Adequate light on the qualitative factors like workers' and consumers' attitude towards the company, research and development effort, the quality and calibre of management, limitation arising from the great fall in the money value, i.e., inflation, are some types of information that are generally lacking today.

The present-day annual accounts have become unwieldy. It is necessary to rationalise this media of dissemination of information. Some of the information presently contained in the accounting statements may be transferred to the Board's Report, e.g., statistical information. Use of separate ancillary statements (schedules) along with the main accounting statements and the Board's Report may increase the members' ability to comprehend the message that the company wishes to convey to them.

Some of the non-conventional needs may be met by : inflation adjustment accounting statements ; statement on human resources ; statement on research and development ; statement on divisional performance ; statement on employees ; statement on value added ; statement on social costs and benefits ; statement of business involving foreign currency ; statement of computation of bonus ; statement of source and application of funds and cash flow and profit projections.

Board's report, as discussed above, may be expanded so as to contain non-conventional information regarding corporate objectives, corporate activities, production made in quantities, installed capacity, product-pricing, product-quality and the method of distribution, employees' safety and welfare measures, directors' dealings in company shares, etc.

It may be noted that, besides the two aforesaid media, an opportunity also is afforded to the shareholders by the annual general meeting for information to be elicited by the members. The members have a right of criticising the accounts placed before them and of asking for additional information. The Annual General

Meeting, therefore, also serves as good vehicle of communication between the management and the members.

Directors' Report :

The Directors hereby submit their report and the statements of account for the year ended 31st December, 1979.

The accounts, before charging depreciation show a loss of	Rs. 20,28,724
To which has been added depreciation	Rs. 10,12,196
	Rs. 30,40,920
The Directors have transferred from General Reserve	Rs. 8,40,920
Leaving the loss to be carried forward	
	Rs. 22 00,000

The Board regrets inability to recommend any dividends for 1979.

The sales figure for the year under review of Rs. 240 lakhs is lower than that of the previous year by Rs. 15 lakhs. This figure, however, does not include sugar mill machinery worth Rs. 50 lakhs despatched to the site under a turnkey contract, as this machinery will be billed for after erection at site.

In their report last year, the directors had stated that the adverse factors which had affected the company's engineering division, in common with many other engineering units of a similar type operating in West Bengal, would take time to overcome During 1979, both the shortage and escalation in the cost of essential raw materials, particularly steel, continued. Concerted efforts were made to reduce costs wherever possible, but the savings effected were neutralised by increased material costs, the costs of borrowings and frequent interruptions in power supply. There interruptions in power supply were in fact more numerous than in the preceding year. Industrial unrest and 'bandhs' continued to disrupt the flow of production until the last quarter of the year when the general climate showed an improvement.

Consequent on the failure of the customers to meet their contractual payments, turnkey contracts for two sugar mills to which a reference was made last year, have become inoperative. The work on the third turnkey sugar mill contract is, however, in progress. But the prices of materials have, meanwhile, escalated considerably and negotiations are continuing with the customer for a price revision.

During the year under review, the sales of tea machinery showed a substantial increase of over 30% and the production facilities are being augmented to cope with increasing orders There was also an increase in the sale of electrical products manufactured by the company. Our selling agencies for electrical products registered an improvement which is reflected in the increase in commission on sales.

The development activities in new product lines are now beginning to yield results. A vibratory tea packer and a new model of the two-stage tea drier, incorporating a variable speed gear box, which have both been developed and manufactured indigenously, have recently been introduced in the market. This year, flame-proof switchgear equipment for the mining industry will be marketed and an initial order for Rs 8 lakhs has already been secured. A continuous fermenting machine and an extended super-drier for the tea industry are contemplated to be introduced in the market during the current year. Our efforts at import substitution have yielded results, and the company was able to develop indigenously a range of water-cooled bearings for industrial fans, and a composite bearings-assembly unit for centrifugal machines. The selling agencies operated satisfactorily and during the year under review the company has been appointed as selling agents of Southern Switchgear Ltd. which manufactures high and low tension switchgears in collaboration with Broom Electrical Company Ltd, Laughborough.

An improvement in the operational results of the engineering division will be dependent on the availability of steel and other essential raw materials as well as on the power-supply position. In the meantime, your directors are considering schemes for reducing the impact on the company of the adverse factors which affected the port unit of the engineering division the most.

Changes made in the company's investment portfolio resulted in a profit of Rs. 18 lakhs. This amount has been credited to the Capital Reserve Account. An important feature of these changes was the sale of the company's entire holding of equity shares in Hedge Amalgamated Mills Ltd These shares were sold at a price of Rs. 25 each The return on these investments had been less than 3% on an average during the last 5 years, and in the circumstances, the sale has been of substantial benefit to the company. These changes in investment have also reduced the depreciation in our investment from the year's figure of approximately Rs. 50 lakhs to nearly Rs. 17 lakhs.

As at 31st December, 1979, Fixed Deposits amounting to Rs. 22,000 in respect of 7 persons had matured but had not been claimed. In addition, interest amounting to Rs. 7,000 remained unclaimed as at the end of the year.

Consequent upon his retirement from India, Mr. J S. Jonstone resigned from the Board with effect from 31st March, 1980. The directors wish to record their appreciation of the services rendered by Mr. Jonstone during his long association with the company.

Mr. S.K. Mukherjee and A.B. Das resigned from the Board with effect from 1st March and 18th March, 1980 respectively, and the directors wish to record their appreciation of the services rendered by them during their association with the company Mr B.C. Jain was appointed as a director to fill the vacancy caused by the relignation of Mr. S.K. Mukherjee.

Lord Catto of Cairncatto and Mr. Ganapathy retire from the Board by rotation, and being eligible offer themselves for reappointment.

A statement, giving particulars of employees under Section 217 (2-A) of the Companies Act, 1956, an re quired to be included in the Directors' Report, is given in Annexure 'A'

SEARLE (INDIA) LIMITED

Annexure 'A' to the Directors' Report for the year ended 31st December, 1980
Particulars of Employees under Section 217 (2-A) of the Companies Act, 1956

Sr. No.	Name	Designation	Total Remuneration	Net take-home pay	Nature of duties	Qualifications	Experience in years	Date of commencement employment
			(Rupees)	(Rupees)				
1.	Mr. V. J. Carrasce	Area Sales Manager	41,641	24,228	Zonal Pharmaceutical Sales	B.Sc.	13	21-4-1969
2.	Mr. D.N. Chaturvedi	Secretary and Chief Accountant	50,668	26,228	Secretarial, Accounts and Finance	M Com., A.C.A., A.I.C.W.A.	12	4-10-1971
3.	Mr. S.K. Ghosh	Production Manager, Pharmaceuticals	53,208	26,537	Pharmaceutical Production	M. Pharma	15	1-10-1969
4.	Dr. R.N. Goel	Deputy Managing Director and Technical Director	95,912	28,663	Executive, Technical and Administrative duties	M.Sc., Ph D. F.R.I C. (London) F.I.C.S.	16	1-11-1967
5.	Dr. H.M. Lal	Medical Advisor	75,771	27,030	Medical Advice, Clinical Trials, Training, and Product Development	M.B.B.S., F.R C.P., D H.O., M.D. Ph. D.	10	12-5-1967
6.	Dr. A.S. Mehta	Factory Manager	46,523	26,736	Factory operations	M A. (Cantab) Ph. D., (M.I.T., U S A)	11	12-9-1972

Sr. No.	Name	Designation	Total Remuneration	Net take-home pay	Nature of duties	Qualifications	Experience in years	Date of commencement of employment
			(Rupees)	(Rupees)				
7.	Mr. S.S. Rangnekar	Managing Director	1,29,959	29,023	Executive and Administrative duties	B Sc. (Hons.) B Sc. (Tech.) M B.A. (Kansas, USA), A.C.S., A.C.I.S. (London)	24	29-12-1969
8.	Mrs. R.B. Shroff	Manager, Personnel and Administration	58,041	25,963	Personnel, Industrial Relation and Administration	B A.(Hons) Dip. S.S.A. M.S.W. Columbia, USA)	29	12-5-1967
9.	Mr. B.A. Shukla	Commercial Manager	57,371	28,628	Purchase and Chemical Sales	B Sc. (Hons) M.S., NYU, U.S.A.	16	1-12-1967
10.	Mr. A. Subedar	Marketing Manager	74,485	24,048	Pharmaceutical Marketing	B.Sc.	20	19-2-1970

Notes :

1. All the above employees were employed throughout the financial year. There was no employee, employed for a part of the financial year and who was in receipt of remuneration of Rs. 3,000/- per month or more.
2. None of the above employees is related to any Director of the Company.
3. Nature of Employment whether contractual or otherwise : All appointments are/were contractual.
4. Other terms and conditions :
   (a) The appointments of Managing Director and Deputy Managing Director and Technical Director are contractual for 5 years and terminable by six months' notice on either side.
   (b) The appointments of all the remaining employees are governed by the rules and regulations of the Company as in force from time to time.
5. The net take-home pay as shown above is the amount of the salary and dearness allowance paid to the employee after deduction of provident fund contribution and all taxes on salary, perquisites and allowances after adujusting statutory reliefs.

Auditors have to be appointed for the current year, and the retiring auditors, Messrs. Wilaitiram & Co offer their services.

Calcutta, 30th April, 1980

On behalf of the Board,
Chairman.

Gentlemen,

I have great pleasure in inviting you to this fifty-sixth Annual General Meeting of our Company.

It is needless to say that the Company is old but a well-established and efficient organisation. The new Industrial Policy Statement of the Government was at least clear-cut and categorial in the sene that it was designed to reflect and reconcile the socio-economic benefits and prejudices. But of late there have been disturbing rumblings

Except this company, all the other producers of Iron and Steel are public sector units. Desptte this fact we are frowned upon as "large house" or "monopoly house". Stigma or no stigma, so long as the new policies are adhered to for some reasonable time, the Company has the capacity to gear up to the needs of the country. But as luck would have it, within a short time after the announcement of the Industrial Policy, ominous pronouncements started pouring in from various high quarters Should such pronouncements be implemented many of the basic contents of the Industrial Policy Statement would be nulified. There is a demand for nationalisation of this Company from various quarters The Company has been charged with a rate of growth disproprtionate to the size of our internally-generated resources and largely based on borowed funds from public financial institutions and banks. Since the prices of products of most large industries are controlled by the Government from time to time at uneconomically low levels, including steel prices, internally-generated funds, including allocations to depreciation can hardly be said to be sufficient to meet the replacement costs, what to talk of modernisation or expansion. In the circumstances, the Company has to per force resort to borrowing As the government has come to wield a virtual monopoly, the Company has no choice but to approach the government for its legitmate borrowings. In spite of doubts and uncertainties. I assiduously hope our unflinching devotion and unselfishness will enable us to steer clear of the difficulties and serve the nation as we have done for long fifix-six years.

You will have observed from the Directors' report and the profit and loss account of the Company that though the financial results of the Company in the year under review are marginally better than that of the previous year yet they are lower than what was expected. The main reason therefor was the large increase in expenditure on wages itself from the extra bonus that the Company had to pay. The Company's turnover in 1978-79 was Rs. 290 crore higher by Rs. 15 crore compared to the previous year This was due to the price increase from June,1978 and a better product-mix, partly offset by lower sales. The pre-tax profit or Rs 15 crore as against Rs 5 crore in the previous year reflected the combination of the benefits of the price-rise, product-mix imp ovements and lower interest-charges on the one hand and increase in operating costs due to wage revisions of steel workers and

colliery workers, increase in prices of raw materials and stores, on the other. The after-tax profit for the year under review was Rs. 8 crores as against Rs 3 crores in the preceding year. The company produced 1.5 million tonnes of saleable steel representing 90% capacity utilisation. Sales amounted to 1.4 million tonnes. Last year, there was a record output of 1.6 million tonnes The shortfall was due to reasonable grounds which existed till the end of the Company's financial year.

You will be little happy to find that the Board has been able to recommend a higher dividend this year despite the reduced profit.

Although, the Government has kindly conceded the representative request for an increase in steel prices, the actual increase is too meagre to meet the essential requirements of the industry in the public or private sector, firstly because the inevitable increases in costs borne since the earlier revision of prices remain partially uncompensated, and secondly, because the revised ex-works prices do not enable the industry to finance, from internal savings, the continuous replacement of worn-out and obsolete equipment so as to keep up the productivity and efficiency of the plant. The protection of customers' interest is undeniably commendable, but whether it is economically viable to charge a heavy excise duty on a basic material like steel the cost of which impinge on all finished products is a debatable issue. I am of the opinion that it does not make sound economic sense to allow the producers excessively low ex-works professedly in the consumers' interest, and then to take from the consumers at least twice as much as has been denied to the producer. As a result of price revision, many of you might have made your calculations of profit and dividends. But while doing so, you must not ignore unavoidable increase in costs and the limit on dividends imposed by the Government.

As regards modernisation programme you will have noticed from the Directors' report that estimated cost of replacing less than half of the Company's steel-making and finishing capacity by new facilities using modern equipment and processes will be more than double the amount that the Company spent in early sixties on building what was practically a complete integrated million-tonne plant. The two-pronged programme of modernisation referred to in the Board's report which includes expansion of the Company's collieries and replacement of a smelting shop is going to be launched by the Company very soon. The Company's rolling plan of five years, costing approximately Rs. 150 crore includes a Rs. 35 crore programme of expansion of its collieries. The Company will be borrowing Rs. 25 crore for this purpose from public financial institutions for which the Government has agreed to waive the convertibility clause. The work was being done at the instance of the Government, on the condition, that when the Company's collieries start producing more, it would not take govt. quota; thenceforward it would be released by the Govt. for other purposes. The other modernisation programme, costing Rs. 140 crore contempalates, *inter alia*, replacement of the Company's 45-year-old smelting shops by modern ones This would result in incidental expansion of the Company's production by 7%. It is needless to say that the objecive behind the modernisation programme is to attain self-sufficiency of the coking coal and produce better quality steel economically.

You will, I an sure, appreciate that, while the financial results of the Company in the year under review are only marginally better, owing to some extra but

inevitable burden of expenditure, there is nothing to be dejected inasmuch as the performance of the Company from the standpoint of production and sales is commendable. The achievement of the Company with its pretty old plant in the matter of all-time production records in a number of its department and an overall output in excess of cent percent of its rated capacity is not mean by any standard. Such an achievement would have remained visionary, but for the concerted efforts of the entire work force, the members of which under a dynamic pilot in the Company's managing director, showed an exemplary sense of responsibility, discipline and devotion to duty. Before I conclude, I would like to thank my colleagues on the Board for their unstinted co-operation and all the officers, staff and workers of the Company for the hard and sincere work they have put in.

New Delhi.
The 14th May, 1981.

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Chairman

Company Correspondence

Correspondence in company matters is dealt with by or in the name of the company secretary These matters cover a wide range of subjects. Broadly, such correspondence may be classified as follows :

Correspondence with members: The secretary is the organ of the Board of Directors and a vital link between the company and its members or the public. Being authorised by the Board, he has to convene meetings, notify declaration of dividends, deal with the issue, transfer, transmission and allotment of shares or debentures, further issue of shares, bonus issue, etc., and disclose the position of the company as required by the Companies Act Secretary's correspondence with members relates mostly to statutory and formal matters. But, in special circumstances, he is also required to reply to letters of inquiries relating to prospectus of the company, rate of dividend, any irregularity on proceedings of meetings, loans and investments, any question arising out of transmission of shares, loss of share certificates or dividend warrants, any court proceedings etc. In all statutory or formal correspondence, the secretary acts as the agent of the company or the Board as well as one subservient to the Act and the company's articles. In other types of correspondence, he can, however, exercise some amount of discretion. But in view of his fiduciary relationship *vis a-vis* the company and the general body of shareholders, he should exercise his discretion in the larger interest of the company.

Correspondence with the directors : The secretary is the servant of the company under the control of the Board. He is required to deal with all correspondence in connection with the directors and record their deliberations and decisions. He must maintain written records of his dealings and communications with the directors. His dealings with them needs the utmost tact. His language be polite and at the same time firm He must observe decency and decorum in communicating with the directors to fiurnish or withhold any information or draw their attention to any matter in the interest of the company.

Correspondence with the public : In this connection, his dealings are maninly customers, brokers, other companies or public bodies, creditors, etc. He must be

courteous, tactful and must guard against disclosure of secrets or favouring anyone unduly, *e.g.* by disclosing some new development. His letters must be firm, dignified and convey a good impression about the company.

Methods of change in the existing Accounting year and their merits :

The Companies Act does not put any embargo on a limited company's capacity to change its accounting year. Three alternatives may be available for effecting the change in the existing one in a case where, say, the audited accounts for the year ended 31st March. 1980 were adopted in the annual general meeting held in September, 1980, and the company wants to change the accounting to 1st July-30th June every year. These are as follows :

(a) To close the accounts for three months ending, 30th June, 1980 and then twelve months ending 30th June every year.

(b) To close the accounts for twelve months ending 30th March, 1981 and then for three months ending 30th June, 1981 and then for twelve months ending 30th June every year.

(c) To close the next accounts for fifteen months ending 30th June, 1981 and then for twelve months ending 30th June every year.

As regards the merit of the first alternative mentioned above, it is capable of being implemented immediately.

The merit of the second alternative lies in the fact that it can be implemented in a gradual manner without disturbing the existing accounting and administrative set-up.

As regards the merit of the third alternative, the company can claim proportionate depreciation allowance for tax, accounting and company law purposes. The company will get 12 months' time to file its retuurn of income for income-tax purposes and also the return of chargeable profits for surtax purposes. The fact of paying interest or penalty for delayed filing of the return will pose no problem; there will also be no need for seeking extension of time for filing the returns The tax- liability (including advance payment of tax) would be postponed for all future years, since the liability to pay the tax would arise only after the income has been earned and not before. In future, the annual general meetings have to be held by 31st December every year as the accounts will be closed on 30th June. The change may also be beneficial to the cash-flow position of the company

Approvals and intimation for change in existing Accounting year and relative Rosolutions : The intimation of the change in the accounting year has to be given to (a) the Income-tax Officer, (b) the Registrar of Companies, and (c) all the shareholders and bankers of the company, all these entities being directly concerned with the company's accounting year and its financial results. No approval is required to be obtained from any of them under the law (except in cases where the articles of

the company need to be amended by a special resolution), as it is the right of the Board of Directors of the company. If the financial (or accounting) year is indicated or specified in the articles of association (as is usually the case), the relevant clause in the articles should be amended. The change in the accounting year can be generally given effect to only by passing a Board resolution. Only if the articles contain a specific clause in regard to the financial year of the company, the change in the accounting year by amending the articles would necessitate the passage of a special resolution.

Resolution for the alteration of articles under Section 31, where the financial year is specified in the articles "Resolved that the general meeting of the company held on..... 1980 records its consent, by a special resolution, so as to substitute the words and figures '1st July to 30th June' in the place of the words and figures '1st April to 31st March' as appearing in the said clause."

Board's resolution, where accounting year is not specified in the company's articles of association : "In exercise of its general powers which are exerciseable by the Board and which are not exerciseable, either under the Companies Act or the Memorandum of Association or the Articles of Association, by the Company in its general meeting, the Board hereby resolves that the accounting year of the Company be changed from the existing one (namely from 1st April to 31st March every year) to the year from 1st July to 30th June every year for the sake of convenience of the Company in the matter of preparation and consolidation of accounts of the two factories of the Company situated at two different States; further that the Chairman of the Board be and is hereby requested to give intimation to the Income-tax authorities, the Registrar of Companies and all shareholders and bankers of the Company inasmuch as all these entities are concerned with the Company's accounting year and its financial results."

Various Periodical Returns to be filed with the Registrar :

The main and most important periodical returns to he filed every year by a company with the Registrar of Companies are :—

(a) Balance Sheet and the Profit and Loss Account.

(b) Annual Return.

Under Section 220 of the Companies Act, three copies of the Balance Sheet and Profit and Loss Account have to be filed with the Registrar within thirty days from the date on which Balance Sheet and Profit and Loss Account were laid before a company at an annual general meeting Every company must in each year hold an annual general meeting and not more than 15 months should elapse between the date of one annual general meeting and that of the next. Under Section 210 of the Act, the Board of Directors of a company must lay before the annual general meeting the company's Balance Sheet and Profit and Loss Account within 6 months of the closing date of the accounts. However, certain relaxation of these provisions have been made for the first accounts and first annual general meeting after incorporation of the company.

Under Section 159, every company having a share capital must within sixty days from the date of annual general meeting prepare and file with the Registrar, an annual return containing the particulars specified in Part I of Schedule V, as they stood on the day of the annual general meeting, regarding its registered office, the registers of members and debenture-holders, shares and debentures, its indebtedness its past and present members and debenture holders, its directors, managing directors, managers and secretaries (past and present).

In addition to these two returns, the following periodical returns are also required to be filled:—

(1) Memorandum and Articles of Association at the time of incorporation under Section 33.

(2) Prospectus or statement in lieu of prospectus by a private company within 30 days of ceasing to be a private company [Section 44 (1)].

(3) Prospectus to be delivered to the Registrar for registration on or before the date of its publication.

(4) Return of Allotment and also copies of relevant contracts in cases of allotment otherwise than for cash, return as to allotment of bonus shares, a copy of the resolution authorising the issue of such shares, and a copy of the resolution authorising the issue of shares at a discount together with a copy of the Court's order sanctioning the same and also a copy of the order of the Central Government, where the maximum rate of discount exceeds 10% to be filed.

(5) A printed copy of the articles as altered and approved by the Central Government for converting a public company into a private company within one month of the date of receipt of the order of approval [Section31 (2A)].

(6) Statement in lieu of prospectus where no prospectus is issued or no allotment is made though issued, to be filed 3 days before the first allotment [Section 70 (1)].

(7) Return with regard to increase of share capital to be submitted within 30 days of the receipt of the Central Government's order [Section 94A(3)]

(8) Return with regard to declarations of beneficial ownership in a share, to be submitted within 30 days from receipt of declaration [Section 187C (4)].

(9) Return in duplicate in the prescribed from as to particulars specified in the register of directors, etc., and notification, also in duplicate in the prescribed form, of change among the directors, etc, to be submitted within 30 days from the appointment of the first directors for the return; within 30 days from the change among the directors, etc, for the notification [Section 303 (2)].

(10) Abstract of the accounts in the prescribed form by receiver appointed under power conferred by any instrument—once in every half year and on ceasing to act as receiver [Section 421].

(11) Copy of account and return of the holding of the final meeting or meetings with date or dates thereof to be filed by the liquidator in voluntary winding-up—to be submitted one week after the meeting or meetings [Sections 497 (3) and 509 (3)].

(12) Return in the prescribed form by foreign companies where documents or particulars altered—within the prescribed time [Section 593]

(13) Three copies of balance sheet and profit and loss account made out in every calendar year and other documents required of a company under the Act together with 3 copies of a list in the prescribed form of all places of business in India—no time-limit for their submission being fixed [Section 594 (1)].

The time-limit within which the following returns will have to be filed is indicated hereunder :

(a) Resolutions passed at General Meetings other than A.G.M.	(a) If the resolutions are registrable under Section 192 of the Companies Act, a copy of every resolution together with a copy of the Explanatory Statement shall be filed with the Registrar within 30 days of passing of the resolution
(b) Appointment of first auditor by the Board of Directors.	(b) The first auditor shall be appointed by the Board within one month of the date of registration of the Company [Section 224 (5)]. The auditor has to inform the Registrar within 30 days whether he accepts the appointment.
(c) Disclosure of interest by Directors.	(c) & (d) Every director who is in any way interested or concerned in a contract or arrangement entered into or to be entered into by or on behalf of the company shall disclose the nature of his concern or interest at a meeting of the Board of Directors at which the question of entering into contract or arrangement is first taken into consideration or at the first meeting of the Board held after he becomes so concerned or interested. For this purpose, a general notice given to the Board by

(d) Disclosure by a Director of his holding office of Director, Managing Director in other Companies.	a director shall be deemed to be a sufficient disclosure. Such general notice shall expire at the end of the financial year but may be renewed for further period of one financial year at a time by fresh notice. No intimation to the Registrar is necessary.
(e) Change among the Directors and Managing Directors.	(e) Return to be filed with the Registrar within 30 days of the change.

Steps to be taken where certain particulars as to a subsidiary company cannot be included in the balance sheet of its holding company : (i) To invoke the aid of Section 212 (1) of the Companies Act through a letter on the holding company's letter head, to be addressed to the Secretary to the Govt. of India, Department of Company Affairs, Shastri Bhavan, Dr. Rajendra Prasad Road, New Delhi (ii) To state in the said letter seriatim : (a) that the financial year of the company (i e , the holding company) ends on.....and that the company is required to hold its annual general meeting on or before.....for which the company has been taking necessary steps ; (b) that the financial year of the subsidiary, viz ,.....ends also on.....and that it should be necessary under Section 212 of the Companies Act, 1956 to attach the balance sheet and profit and loss account of..... (name of the subsidiary' for the year ended.....to the holding company's balance sheet, but the accounts of the subsidiary have not yet been finalised to approved for reasons (to be stated). (iii) To seek permission, invoking the aid of Section 212 (8), to attach the report and accounts of the subsidiary as at..... (i.e , as at the previous financial year) to the reports and accounts of the holding company; alternatively to seek permission for circulating the report and accounts of the said company as at .....at a later date. (iv) To enclose with the said letter a copy of the resolution of the Board of Directors together with a challan for Rs.....being the prescribed fee. (v) To request the Govt., to treat this letter as an application under Section 212 (8) of the Act. since no form has been prescribed by the Companies (Central Government's) General Rules and Forms, 1956 and beseach the said permission.

Applications under Sections 108A/108B/108C : The Companies Act does not prescribe any form to apply for approvals under these Sections. But the practice shows that the Department calls for additional information in the following proformas :

I. Proforma for acquisition of shares under Section 108A (1)

1. Name and address of Applicant	TAC Ltd., Indraprastha Marg, New Delhi-110002.
2. Names of Directors of Applicant	1. Shri S K. Tilak 2. Shri P D. Topi 3. Shri A.S Chorey 4. Shri B N. Updeshak
3. Proposal for approval.	Acquisition of shares of Nataraj Industries Ltd.

4. Name and regd. office of whose shares are proposed to be acquired.	Nataraj Industries Ltd., 28, Parliament Street, New Delhi-110001
5. Whether the company whose shares are proposed to be acquired is registered under the MRTP Act. If so, indicate the registration No.	Yes 79/1970
6. Names of the directors of the company whose shares are to be acquired.	1. Shri A.P. Birla 2. Shri C R Goenka 3. Shri N.A Mehta 4. Shri G.D Tata
7. Details of the proposed investment	
(a) Number and nominal value of shares to be acquired.	1 lakh equity shares of Rs. 10/- each
(b) Whether the proposed shares are to be acquired as a result of transfer or a result of fresh issue.	To be acquired by transfer
(c) Whether the shares are to be beneficially held by the applicant.	Yes
(d) Rate at which the shares are to be acquired and full justification for the same.	Rate at which to be acquired Rs. 13/- per share (Market value Rs. 13/50 per share)
(e) Amount to be invested	Rs. 13 00 lackhs
(f) Whether the shares are quoted on any stock exchange. If so the price at which the shares are quoted, date of quotation and name of the Stock Exchange.	Yes Rs. 13.50 on 1.3.1976 in Calcutta Stock Exchange
(g) Form of payment	Cash cheque
(h) Break-up value of shares as per latest Balance Sheet as calculated in Annexure I	Rs. 18/-
(i) Value of shares based on yield as calculated in Annexure II	Rs. 14/-
(8) (a) Whether the assets of the company were valued by the management with the assistance of a valuer during the last two years. A statement in respect of the value of assets together with the basis of valuation may be attached to the application.	No

(b) In case the fixed assets of the company whose shares are proposed to be acquired have been revalued at any time, full details thereof.	Not applicable
9. Full details of the persons (name, address, etc.) from whom the shares are proposed to be acquired.	Manju Investment Trust Private Ltd., 24, B.C. Road, Calcutta-29
10. The purpose proposed to be served by acquiring shares and in what way it is in the interests of the applicant company.	Investment of surplus funds and to have controlling interest in management by appointing a nominee directors. The benefits and advantages acquiring from the acquisition are given in the enclosed statement (not reproduced.)

11. Pattern shareholding in the company whose shares are to be acquired :—

Sl. No.	Name	No. of equity shares held	Percentage to equity capital
1	Applicant	1,00,000	20%
2.	Body corporate or bodies corporate under the same management and constituent of group to which the applicant belongs.	—	—
3.	Public financial institution by name : Life Insurance Corporation of India	40,000	8%
4.	Directors	10,000	2%
5.	Non-residents	—	—
6.	Central of State Governments	—	—
7.	Others	3,50,000	70%
		5,00,000	100%

NOTE :— 1. In case where shareholding of any individual/constituent exceeds 1% of the total equity capital of the company please indicate the name of each such shareholders and the shares held by them separately.

2. Please indicate how the shareholding of the applicant together with the inter-connected constituents of the group exceeds or will exceed, after the proposed purchase of shares, 25% of the paid-up capital of the company warranting application of Section 108A of the Act.

12 (a) Whether the shares are to be acquired in his/its own name or in the name of any other person. If the shares are to be acquired in the name of any other person, give full particulars thereof with relationship, if any.	To be acquired in the name of the company except the qualification shares in the name of the nominee directors as required as per provisions of Section 49 of the Companies Act, 1956.
(b) If the answer to (a) above is in the affirmative, the reasons therefor.	
13. Relationship / association, if any, of the acquiring party with the transferor(s) and with, the directors of the company of which the shares are to be acquired.	No relations
14 (a) Details of funds available out of which the shares are to be acquired (in case the applicant is a company cash-flow statement for five years including the year in which the transfer is proposed should be attached)	Separate cash - flow statement attached
(b) If any part of amount to be invested is to be financed by borrowings, the amount of loan and sources of finance with terms regarding repayment, interest, security, etc. to be stated.	Not applicable
15. (a) Whether the provisions of Section 372(4), 108B of the Companies Act and/or Section 23 (4) of the MRTP Act, or any other statutory provisions are applicable in respect of the above transaction. If so, whether they have been complied with. Please give particulars.	Separate applications have been made under Sections 372 and 108B, of the Act on 15th March 1976.
(b) Whether the approval of the competent authority under Foreign Exchange Regulation Act is needed to the proposed acquisition. If so, it may be stated whether necessary approval has been obtained. A copy of the said approval may be enclosed.	Not applicable

16. Whether there will be any change in the composition of the Board of Directorsof the company whose shares are proposed to be acquired as a result of the proposed acquisition ? If so give details.

Additional directors will be appointed on the Board, of Directors being nominee of TAC Ltd.

17. Any other information which the company wants to furnish.

18. Please enclose the following :

(i) A treasury challan towards prescribed application fees, in case the applicant is a company.

(ii) One copy of the audited Balance Sheet and Profit and Loss Account of the company whose shares are proposed to be acquired for each of the last 3 years.

(iii) One copy of the audited Balance Sheet and Profit and Loss Account of the applicant for each of the last three years, if the company is a company.

(iv) Enclosures as stated above.

For TAC Ltd.
Sd/- S.K. Tilak
Director

New Delhi-2
Dated..... .....

.....
Signature of the applicant.

Note : (1) The above information together with enclosures should be furnished in triplicate

(2) The information in respect of items 7 (h), 7 (i), 8 (a), 8 (b) and 14 (a) and (b) need not be furnished, if the nominal value of the shares proposed to be transferred is less than Rs. 10,000/-

II. ADDITIONAL INFORMATION IN RESPECT OF INFORMATION TO THE CENTRAL GOVERNMENT OF THE PROPOSAL TO TRANSFER SHARES

Pursuant to Sections 108B/108C

1. Name(s) of the transferor(s) and address(es) of its/their registered office(s) : XYZ Ltd., New Delhi.

2. Names of Directors of transferor(s) if the transferor(s) is are company(ies) Shri B.R. Malik, Shri R.S. Patni Shri S.K. Dinghra

3. (a) Name and address of the registered office of the company whose shares are proposed to be transferred :	Sumit Gunny Bags (P) Ltd. Delhi-31
(b) The total issued, subscribed paid-up equity share capital of the company whose shares are proposed to be transferred :	Rs. 50 lakhs. Consisting of 5 lakhes equity share of Rs. 10 each
(c) The number, nominal value and other particulars of shares that are proposed to be transferred :	1 lakh equity shares of Rs. 10/- each.
4. Composition of Board of Directors of company whose shares are proposed to be transferred :	1. Shri S.B. Arora 2. Shri H.K. Singh 3. Shri A.K Verma 4. Shri S.D. Gogia
5. Whether the company, whose shares are proposed to be transferred, is an undertaking to which provisions of Part A of Chapter III of the MRTP Act, 1969 are applicable. If so, indicate the registration number ;	Yes 79/1979
6. Present holding of the transferor(s), including those of companies under the same management with percentage of shares held, in the nominal value of the subscribed equity share capital of the company whose shares are proposed to be transferred :	Separate list attached
7. Name(s) of the proposed transferee(s) and its/their address(es) :	Manu Plywood Industries Ltd., New Delhi.
8 If the transferee is a company, names of its directors :	1. Shri J.P. Hazarati 2 Shri M R. Batra 3. Shri R.K. Bansal 4. Shri S K. Gupta

NOTE : Each body corporate who hold more than 1% of the total equity capital should be indicated separately.

9. Number and the nominal value of the equity shares already held by the proposed transferee(s) and the other constituents of the group to which the transferee(s) belongs in the equity capital of company whose shares are proposed to be transferred and the percentage of shares held to the total equity capital of the company :	10,0000 shares of Rs 10/- each i.e. Rs. 10 lakhs being 20% of the total share capital

10. Number and the nominal value of the equity shares after acquiring the proposed number of shares by the transferee and the constituents of the group to which the transferee(s) belongs in the capital of the company whose shares are proposed to be transferred and the percentage of shares that will be held after acquisition to the total equity capital of the Company :	2,00,000 share of Rs 10/- each i.e., Rs 23 00 lakhs being 40% of the total share capital
11. (a) Whether the assets of the company were valued by the management with the assistance of a valuer during the last two years. A statement in respect of the value of assets together with the basis of valuation may be attached.	No Not Applicable
(b) In case the fixed assets of the company whose shares are proposed to be acquired have been revalued at any time, full details thereof :	-do-
12. Rate at which the shares are proposed to be transferred :	Rs. 13/- per share
13. Whether the shares to be transferred are quoted on any stock exhange. If so, the rate at which they are quoted, date of quotation and name of stock exchange where they are listed may be stated :	Quoted in the Delhi Stock Exchange @ Rs. 13/50 per share on 1 3.1976
14. (a) Break-up value of shares as per latest balance sheet of the company whose shares are proposed to be transferred as calculated in Annexure I	Rs. 18/-
(b) Value of shares based on yield basis as calculated in Annexure II.	Rs. 14/-
15. Whether the proposed transfer of shares will result in any change in the composition of Board of Directors of the company whose shares are proposed to be transferred. If so the details thereof:	Additional directors being a of the transferee company are to be appointed on the Board of the company.

16. (a) Whether the approval of the competent authority under the Foreign Exchange Regulation Act is needed for the transfer of shares.	No
If so, it may be stated whether necessary approval has been obtained. A copy of the said approval may be enclosed :	Not applicable
(b) Whether the provisions of Sections 372(4) and 108A of the Companies Act and/or Section 23(4) of the MRTP Act and/or any other statutory provisions are required to be complied with by the proposed transferee(s) for acquiring the shares If so, whether they have been complied with. Please give particulars :	Application pursuant to the provision of Sec. 108A by the Companies Act has been made by the transferee to the Central Government vide their application dated 15-3-1976.
17. (a) The lines of busines of the company whose shares are proposed to be transferred. Details regarding items manufactured may be given :	Manufacture of ply-wood and tea-chests
(b) Whether the company whose shares are proposed to be transferred or its subsidiaries is engaged in any industry specially in Schedule XIII. If so, the details may be furnished :	No
18. Purpose proposed to be achievd by the proposed transfer of shares :	Controlling interest in the company of which shares are being acquired.
19. Please enclose a copy each of the following :—	
(i) One copy of the audited Balance Sheet and Profit and Loss Account of the company whose shares are proposed to be transferred for each of the last three years.	enclosed
(ii) A copy of the latest Balance Sheet and Profit and Loss Account of the transfer.	enclosed
(iii) A copy of the latest audited Balance Sheet and Profit and Loss Account of the transferee in case it is body corporate.	

20. **Any other information which the company wants to furnish :**

New Delhi.
Dated..... .....

For XYZ Ltd.
Sd/- B.R Malik
Directors.

NOTE : 1. **The above information together with enclosures must be furnished in triplicate.**

2. **The information in respect of items 11 (A) and 11(b), 14(a) and 14(b) need not be furnished if the nominal value of shares proposed to be transferred is less than Rs. 10,000/-.**

Alteration of Articles —Conversion of Public Company into Private Company [S. 31 (1) in Proviso] : (1) Company to be the *applicant.* (2) Application for the Central Government's approval to be made in *Form No 1A* of the Companies (Central Government's) General Rules and Forms, 1956. (3) *Enclosures :* (a) a copy of the special resolution; (b) a copy of the current memorandum and articles of association; (c) a copy of the latest balance sheet and profit and loss account; (d) a copy of the minutes of the General Meeting at which the proposal for conversion was approved; and (e) Treasury challan duly receipted for fee payable. (4) *Guidelines* : (a) Special Resolution to be filed with the Registrar as required by Section 192; (b) a printed copy of the Articles as altered to be filed with the Registrar within one month of the date of the receipt of the order of Approval; (c) the application to be made within 3 months from the passage of the Special Resolution (as per the Department's instructions).

Appointment of Sole Selling Agents (S. 294A) : Under Rule 2 of the Companies (Appointment of Sole Agents) Rules, 1975, a company seeking approval for the appointment of sole selling agent has to submit an application to the Central Government in Form 1 to the said Rules Besides, the Central Government on the receipt of the application, normally asks for the following additional information.

(1) Whether the company has a Sales Department—If so, expenditure on the staff and travelling expenses during the last 3 years to be furnished together with the justification for sole selling agent in the circumstances.

(2) Which of the services (e.g., order-securing, receipt of goods from the company, warehousing facilities, sales promotion through participation in exhibitions, etc., publicity for promotion of products through various media, whether sole selling agent receive any payment regarding company-supplied goods from wholesalers or distributors and passes it on to the company or whether such payment is directly made to the company by consignee, whether the sole selling agent carries *del credere* risk, whether the sole selling agent employ any staff exclusively for marketing the principal's products together with their names, tenure of service and emoluments) rendered by the sole selling agent, to be specified

3. (i) Commission earned from the applicant company during last 3 years to be indicated; (ii) Break-up to be given of the expenditure incurred by the sole

selling agent during the last 3 years under such heads, in respect of the sale of company's products, as (a) salaries, expenses and perquisites (excluding travelling allowance) to the employees, (b) expenses on travelling by officers and staff, (c) rent (office and godowns), (d) warehousing charges, (e) freight and transport, (f) publicity, (g) commission to sub-agents and brokerage, (h) interest.

Note :

(a) The above-mentioned commission and expenses to correspond to the same period and preferably coincide with the accounting period of sole selling agent.

(b) In the event of the sole selling agent being engaged in any other activity save as being the sole selling agent of the company, to give the aforesaid expenses on *pro rata* basis or on any equitable basis adopted by the sole selling agent.

(c) In case of substantial difference between the said expenses and the expenses mentioned in column 17 of Application in Form No. 1, to give the reasons therefor.

(d) To indicate whether there is any other relevant factor to be taken into account in arriving at the profits of the sole selling agent in respect of the sale of goods of the company, duly supported by the figures.

4. (i) Whether the sole-selling agent maintains any current account with the company in respect of the sale of goods—if so, to indicate the debit balance in such account, together with interest (if any) charged. (ii) Whether the sole selling agent gives credit to the sub-agents, dealers, stockists, etc. together with their details

5. Whether there is any price regulation by statute or by voluntary agreement relating to the sale of the product.

6. Whether any sale targets have been laid down during the next 3 years.

7. To indicate how the marketing of the company's product is done with particular reference to the channels of distribution, the number of intermediaries through which commodities passes before it reaches the ultimate consumers.

8. Whether the goods are sent by the company to the sole selling agent's place of business or directly to the consignees on the basis of the sole selling agent's advice or orders procured.

9. Whether the company : (a) reimburses the sole selling agent's expenses; (b) provides him with order form or other stationery material; (c) lets its employees service to him; (d) provides at its cost any publicity or other media; (e) lets him avail of any accommodation at its premises—if so, whether any rent is paid; (f) provides any facilities to him in the shape of conveyance, etc.; (g) provides him any other facilities at subsidised rates.

10. (i) Whether any sole selling agency commission is paid for sales to Govt. Departments and Companies, together with the justification thereof.

(ii) Whether commission is paid to him in respect of sales directly made by the company.

11. Whether the sole selling agent manufacture the same or similar products as his principal.

12. Whether any portion of sole selling agency commission has been disallowed by the Income-tax Department.

13. To furnish copies of his accounts for the last 3 years.
14. To furnish one copy of the latest audited account of the company.
15. To give the names and addresses of the company's auditors.

16. In the case of the sole selling agent being a partnership firm, to indicate such deals as (a) names of partners and their shares in profits, (b) partners' relation ship *inter se* and that to the company's directors, (c) names of the working partners and whether they are whole-time or part-time, (d) whether any salary is paid to the working partners, (e) capital invested in the partnership firm during the preceding 3 years, (f) profits earned by partners during the preceding 3 years.

17. (i) Whether the agency agreement has been registered with the Registrar of Restrictive Trade Agreements, and (ii) whether MRTP Commission has enquired into the agreement and passed any order.

18. To give the following break-up of sales in respect of each of the last 3 years :

I. **Sales** : (a) Direct Sales; (b) Sales made by sole selling agent; (c) Total Sales [(a) plus (b)]

II. **Commission Paid** : (a) Regarding Direct Sales ; (b) In respect of sales through sole-selling agent; (c) Total commission.

III. **Sales made to Govt. Depts., Govt. Companies, Govt. Undertakings**: (a) Directly by the company; (b) Through sole selling agent; (c) Total such sales (i e., a+b)

Particulars of Application to be made to the Central Government

Section	*Subject*	*Particulars*	*Approving Authority*
21/22	Name	Change of name of the company.	Regional Director
25	Deletion of word "limited"	Dispensation with "Limited."	-do-
31	Alteration of Articles	Alteration of Articles which has the effect of converting a public company into a private company.	-do-

Section	Subject	Particulars	Approving Authority
43	A Deemed Public Company	Becoming a private company again	-do-
		Offer of further shares without special resolution to any person	Dept. of Company Affairs
81	Issue of further shares.	Issue of debentures or taking of loans, with a right of conversion into shares	-do-
89	Voting Rights.	Continuance of disproportionately excessive rights.	Dept of Company Affairs.
108A	Restriction on the acquisition of shares	Acquisition of shares in excess of 25% of the paid-up Capital	-do-
108B	Restriction on Transfers	Transfer of shares by a body corporate/bodies coporate under the same management holding 10% or more of subscribed capital of a company	-do-
108C	Restriction on Transfer of shares of a foreign company.	Transfer of shares in a forein company by a body corporate/bodies corporate under the same management holding 10% or more of nominal share capital.	-do-
114	Shares Warrants.	Issue of share warrants to bearer.	Company Law Board.
167	Annual General Meeting.	Calling A G.M. in the case of default by the company	Regional Director.
198	Managerial Remuneration.	Payment of minimum remuneration in absence or inadequacy of profits	Department of Company Affairs.
204	Office or Place of Profit.	Appointment of a body corporate to an office or place of profit for a term not exceeding 10 years.	Company Law Board.
204A	Office or Place of Profit in ex-managed companies.	Appointment of former Managing Agents or Secretaries and Treasurers to the office of Secretary, Consultant, Adviser or to any other office.	Department of Campany Affairs.

Section	*Subject*	*Particulars*	*Approving Authority*
205	Dividends.	Declaration of dividend for any financial year out of profits without providing depreciation or after providing depreciation at a different rate.	Company Law Board
205A	Dividends.	Declaration of dividends out of accumulated profits transferred to reserves.	Department of Company Affairs.
208	Payment of Interest	Payment of interest out of Capital	Company Law Board
211	Form & Contents of Balance Sheet.	(a) Variation in the Form of Balance Sheet	Department of Company Affairs.
		(b) Exemption in respect of particulars to be disclosed in Balance Sheet and Profit and Loss Account.	-do
212	Accounts of Subsidiaries	Exemption to a holding Company from giving certain particulars about, or enclosing Balance Sheet of, subsidiaries.	-do-
213	Financial year of holding company or subsidiary.	Extension of the financial year of the holding company or subsidiary so to coincide or end within 6 moths of each other.	-do-
224	Auditors.	Removal of Auditors before expiry of the term.	Regional Director
233B	Cost Auditors	Appointment of Cost Auditors	Department of Company Affairs
235	Investigation of Company's Affairs	Appointment of Inspectors to investigate the affairs of the company, on application.	-do-
237	-do-	Appointment of Inspectors *suomoto* or upon company passing special resolution or Court's Order.	-do-

Section	Subject	Particulars	Approving Authority
239	-do-	Appointmentof Inspectors to investigate into the affairs of related companies.	-do-
241	-do-	Obtaining from the Govt. a copy of the Inspector's Report.	Department of Company Affairs.
247	Investigation of Ownership	-do-	-do-
249	Investigation of associateship of Managing Agent etc.	Not applicable	Department of Company Affairs.
259	Increase in number of Directors.	Increase in number of Directors in certain cases.	-do-
268	Managing / Wholetime/None-rotational	Amendment of any provision relating to Managing or Wholetime Directors or Non-rotational Directors.	-do-
269	Managing / Wholetime Directors	Appointment/Reappointment of Managing or Wholetime Directors.	Department of Company Affairs.
274	Disqualification of Directors.	Removal of disqualification of a Director in certain cases.	-do-
294AA	Sole Selling Agents.	Appointment of Sole Agents in certain cases.	Company Law Board.
295	Loans/assistance to Directors etc.	Grant of loan or other financial assistance to directors and their associates (specified)	Department of Company Affairs.
297	Contracts with Directors etc.	Contracts with Directors or associates by a company having a paid-up capital of not less than Rs. 1 crore.	-do-
300	Quorum of disinterested Directors.	Relaxation of restrictions relating to interested Directors taking part in discussion or voting.	-do-

Section	*Subject*	*Particulars*	*Approving Authority*
309	Remuneration of Directors.	(a) Payment of remuneration at more than 5% to one Managing Director/Whole-time Director (b) Payment of commission at more than 1% or 3% to a Director.	-do-
		(c) Waiving recovery of excess remuneration paid to a Director.	
310	Remuneration of Directors.	Increase in remuneration of any Director including Managing or Whole-time Director (other than increase in fees up to Rs. 250).	Department of Company Affairs.
311	-do-	Increase in remuneration of Managing Director/Whole-time Director on reappointment.	-do-
314	Office or place of profit.	(a) Appointment of certain persons connected with Directors to office of profit at a remuneration of Rs. 3,000 or more per month.	-do-
		(b) Waiving recovery of any such refundable in respect of office held in contravention of the Section.	-do-
316	Managing Director	Apppointment of a person who is already a ManagingDirector of 2 Companies as a Managing Director	Department of Company Affairs
326,328 329,332, 343,345, 346,347, 352,360,	Managing Agencies	Inapplicable due to the provisions of the Companies (Amendment) Act, 1969.	
370	Inter-Company Loans	Giving loans beyond 20% or 30% of the aggregate of the paid-up capital and free reserves.	Department of Company Affairs

Section	*Subject*	*Particulars*	*Approving Authority*
372	Investment in shares/debentures	Investment beyond 20% or 30% of the subscribed capital.	-do-
373	-do-	continuing to hold investments in excess of the limits upon the Act coming into force (no-longer applicable).	-do-
385	Manager	Appointment/Re-appointment of a person as a Manager.	Department of Company Affairs.
386	Manager	Appointment of same person as Manager of more than 2 companies.	Department of Company Affairs.
387	Remuneration of Manager.	Payment of remuneration to a manager exceeding 5% of the net profits.	-do-
396	Amalgamation	Amalgamation of companies in national interest.	-do-
396A	Disposal of Books and papers	Disposing books and papersof an amalgamated company.	Department of Company Affairs.
399	Oppression or mis-management	Approval of the Govt. to apply to the Court for prevention of oppression or mismanagement.	-do-
408	-do-	(a) Appointment of Directors to prevent oppression or mismanagement.	-do-
		(b) Change in the Board of Directors during the time Govt. Director holds office.	-do-
409	Change in the Board	Prevention of change in Board of Directors likely to affect company prejudicially.	-do-
496 508	General Meeting	Extension of time to liquidator for calling General Meeting in any year.	Regional Director

Section	*Subject*	*Particulars*	*Approving Authority*
551	Statement of Accounts in liquidation.	Exemption to liquidator, in whole or part from preparing a statement of Accounts and filing the same with the Registrar.	Regional Director
555	Unclaimed dividends and undistributed Assets.	Order for payment of any unclaimed Dividends and undistributed Assets out of the companies Liquidation Account.	-do-
572	Name	Change of name by a company seeking registration under Part IX of the Act.	Company Law Board
578(3) (d)	Charter	Alteration of any provision contained in the charter of a Company.	-do-
594	Accounts of a foreign company	Exemption from provisions relating to Form and Contents of Accounts.	-do-
610	Inspection	Inspection of certain documents filed u/s. 605 (1) & kept by the Registrar	Regional Director
620	Government Companies	Modification of Act in relation to Govt. Companies.	Department of Company Affairs.
620A	Nidhi. etc.	Modification of Act in its application to Nidhis or Mutual Benefit Society.	-do-
637B	Condonation delays.	Condonation of delay in making applications to Central Govt. or filing documents with the Registrar.	-do-

Section 43A : Public company becoming private company again [S. 43A(4)] : (a) Company being the applicant; (b) No form prrscribed – a letter to be addressed to the Regional Director, Company Law Board, stating specific facts as to how Section 43A (1 , (1A) or (1B) is no longer applicable to the company; (c) Enclosures: (i) a copy of the latest available balance sheet and profit & loss account; (ii) a copy of the memorandum and articles association; (iii) extracts from the articles of association or other instruments constituting or defining the constitution

of the company regarding provisions applicable to private companies; (iv) a copy of the resolution of the Board or the general meeting, as the case may be, for conversion to private company; (v) treasury challan duly receipted for fee payable. (d) *Guidelines*: (i) In the event of the extracts from articles or other instrument being not in English, a certified translation in English to be attached. (ii) Approval of the members for the reconversion being desirable especially if the number of members is more than 25 - consent of the unsecured creditors of substance being likely to be asked for by the Regional Director of the C.L.B. for protecting their *interests*.

Applications to the Central Government: Only a few such applications are discussed hereunder. These are to be addressed to the Under-Secretary, G/I, Ministry of L.J.C.A., Shastri Bhavan, Dr Rajendra Prasad Road, New Delhi.

1. **For permission to issue further shares without special resolution (Section 81)**: (a) No prescribed form—a letter being sufficient. (b) *Enclosures*; (i) copy of the company's resolution; (ii) extract of the minutes showing the consideration of the item in question; (iii) treasury challan duly receipted for the fee prescribed; (iv) a copy of the memorandum and articles of association; (c) *Guidelines* (i) Reasons as to why the proposal is considered beneficial to the company should be given. (ii) The provisions do not apply to a private company or to the increase of subscribed capital caused by the exercise of option. (iii) No approval is necessary in respect of the issue or allotment of shares within 2 years of the formation of a company or within *one* year after the first allotment; (d) *Time limit*: None—before issue of shares.

2. **For premission to issue debentures or take loans containing right of conversion into shares (Section 81)**: (a) No prescribed form - a letter being sufficient. (b) *Enclosures*: (i) a copy of the special resolution; (ii) a copy of the memorandum and articles of association;(iii) treasury challanduly receipted for the fee prescribed; (iv) a copy of the proposed agreement, if any. (c) *Guidelines*: (i) The provisions do not apply to a private company. (ii) The Central Govt shall have due regard, while considering the application, to (A) financial positions of the company, (B) terms of issue of debentures or loans, (C) rate of interest payable on debentures or loans, (D) the capital and reserves of the company, (E) loan liabilities, (F) profits during the preceding 5 years, and (G) current market price of the shares in the company (d) *Time limit*: Before issue of debentures or taking loans with right of conversion.

3. **For permission to acquire shares (Section 108A)**: (a) *Applicant*: (i) individual group, or (ii) constituent of a group firm, or (iii) a body corporate, or (iv) bodies corporate under the same management seeking to acquire shares. (b) *Form*: None—a letter being sufficient (c) *Enclosures*: (i) a statement giving detailed holdings not only of the applicant but others specified above; (ii) where the applicant is a body corporate, its memorandum and articles and a copy of its latest balance sheet and profit and loss account; (iii) resolution of the Board or company, as the case may be; (iv) treasury challan duly receipted for the fee prescribed (d) *Guidelines*. (i) Premission being needed only in respect of shares of a company (other than a private company which is not a subsidiary of a

public company) registered under the MRTP Act. (ii) Acquisition of even one share above the prescribed percentage being tantamount to contravention. (iii) No approval being necessary for acquisition of preference shares. (iv) 25% to be calculated with reference to paid-up equity capital of the company (v) Approval being necessary for acquisition of shares in the name of any other person. (e) *Time limit*—being none but approval to be obtained before acquisition (f) *Penalty for contravention* being imprisonment for a term extending 3 years or fine up to Rs. 5,000 or both. (g) *Person liable* being one acquiring shares.

4. **For permission to transfer shares of a company (Section 108B):** (a) *Applicant:* Body corporate or bodies corporate under the same management holding 10% more in a company. (b) *Form* : No form prescribed—a letter being sufficient. (c) *Enclosures*: (i) a copy of the memorandum and articles of association of the applicant; (ii) a copy of the latest balance sheet and profit & loss account of the applicant; (iii) resolution of the Board regarding disposal; (iv) treasury challan duly receipted for the fee prescribed. (d) *Guidelines*: (i) Permission being necessary only in respect of shares of a company registered under the MRTP Act. (ii) Approval being not required for transfer of preference shares. (iii) Approval being needed for transfer of even *one* share. (iv) 10% to be computed with reference to subscribed equity share capital and *not* paid-up equity share capital. (e) *Time limit* being none but approval to be obtained before transfer. (f) *Penalty for contravention*: (i) fine up to Rs 5,000, (ii) imprisonment up to 3 years.

5 **For permission to transfer shares of a Foreign Company (Section 108C):** (a) *Applicant*. Body corporate or bodies corporate under the same management holding 10% or more in a company. (b) *Form* : No form prescribed—a letter being sufficient (c) *Enclosures*: The same as mentained under (c) in the immediately preceding paragraph *plus* a copy of the approval to the Reserve Bank where necessaay. (d) *Guidelines*: (i) Permission being required only in respect of shares of a company registered under the MRTP Act; (iii) Approval being unnecessary for transfer of preference shares; (iii) Approval being required for transfer of even *one* share ; (iv) Rejection of application being possible by Central Govt. on being satisfied that such transfer would be prejudicial to the public interest (e) *Time limit* being none, but approval to be obtained before transfer. (f) *Penalty for contravention*: (i) Fine up to Rs. 5,000; (ii) Imprisonment up to 3 years.

6. **For permission to declare DIVIDENDS out of accumulated profits transferred to RESERVES (Section 205A)** : *Applicant* : Company. (b) Form : No form a letter being sufficient. (c) *Enclosures* : (i) a copy of the balance sheet for the last 3 years; (ii) a copy of the memorandum and articles of association of the company; (iii) a copy of the draft/proforma balance sheet and profit and loss account for the year in question; (iv) treasury challan duly receipted for the fee prescribed; (v) a copy of the resolution of the Board. (d) *Guidelines* : (i) Approval being necessary *only if* the proposed declaration is not in accordance with the Rules; (ii) Reasons for recommending a particular rate of dividend being adduced. (e) *Time limit* : Before declaration, i.e., before approval of the company in its general meeting. (f) *Penalty for contravention* being Rs. 500 for every day of default

7. **For exemption in respect of particulars to be disclosed in Balance Sheet (Section 211)**: (a) *Applicant*: Company. (b) Form: No form prescribed—a letter being sufficient. (c) *Enclosures*: (i) a copy of the Board resolution; (ii) draft of the proposed balance sheet and/or profit and loss account; (iii) a copy of the balance sheet and profit and loss account for the latest financial year; (iv) treasury challan duly receipted for the fee prescribed (d) *Guidelines*: (i) If the statements of account fail to give the prescribed particulars, they are not deemed to have disclosed true and fair view of the company's state of affairs; (ii) Reasons for seeking exemption need be fully explained; (iii) The purpose behind this approval is to relieve the company of the hardship of undue rigidity in complying with the requirement as to balance sheet and profit and loss account; (iv) A copy of the approval to be forwarded to the Registrar while filing the statements of account prepared in terms of the approval. (e) *Time limit*: Before publishing the statements of account without giving the prescribed particulars. (f) *Penalty for contravention*: Imprisonment upto 6 months or fine upto Rs. 1,000 or both (Managing Director, Manager, Officers/employees in-default being liable).

8. **For exemption from giving certain particulars about subsidiaries (Section 212)**: (a) Applicant: company. (b) *Form*: No prescribed form—a letter being sufficient. (c) *Enclosures*: (i) a copy of the resolution/decision of the Board; (ii) a copy of the latest balance sheet; (iii) treasury challan duly receipted for the prescribed fee (d) *Guidelines*: (i) The application is generally made when the accounts of the subsidiary are not ready. Reasons for the delay need be given; (ii) The Central Govt, while granting exemption, normally imposes a condition that the accounts of the subsidiary, when ready, should be circulated to the member of the holding company; in such circumstances, the circulation has to be made; (iii) Suitable reference has to be made in the holding company's Director' Report, if its balance sheet is published without attaching the accounts of the subsidiary or giving particulars regarding subsidiary; (iv) The Central Govt. does not grant general approval for more than one year. (e) *Time limit*: Before publication of the holding company's balance sheet (f) *Penalty for contravention*: Imprisonment up to 6 months or fine extending to Rs.1,000 or both (managing director, manager, officers/employees-in-default being liable).

9. **For extension of the financial year of holding company or subsidiary (Section 213)**: (a) *Applicant*: Company extending the financial year. (b) *Form*: No prescribed form—a letter being sufficient. (c) *Enclosures*: (i) a copy of the Board resolution; (ii) a copy each of the balance sheet of the holding company and the subsidiary; (iii) a treasury receipted for the prescribed fee. (d) *Guidelines*: (i) Permission has to be applied for, with a view to extending the financial year of either holding company or the subsidiary so that the financial year of the subsidiary may end with that of the holding company; (ii) The request may be in connection with submission of the accounts to annual general meeting or of the annual return to the Registrar; (iii) There is an obligation on the part of the Central Govt. to accord the approval where the difference is more than 6 months (e) *Time limit*: nil (f) *Penalty for contravention*: Imprisonment up to 6 months or fine extending to Rs 1,000 or both (where the financial year of the subsidiary ends on a day which procedes the day on which the holding company's financial year ends by more than 6 months)—managing director, manager, officers/employees in-default being liable.

10. **For approval of appointment of Cost Auditors (Section 233B) :** (a) *Applicant* : Company. (b) *Form* : No prescribed form—a letter being sufficient. (c) *Enclosures* : (i) a copy of the Board resolution ; (ii) a copy of the latest balance sheet and profit and loss account. (d) *Guidelines* : (i) Statutory auditor cannot be appointed as Cost Auditor ; (ii) Cost Auditor shall normally be a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959 ; (iii) The qualifications of the Cost Auditor are to be clearly specified ; (iv) His appointment has to be made only in industries specified by the Govt. (e) *Time limit* : Such audit to be completed within 120 days from the end of the financial year. Therefore appointment needs be made well in advance. (f) *Penalty for contravention* : (i) Fine up to Rs. 5,000 (company being liable) ; (ii) Imprisonment up to 3 months or fine up to Rs. 5,000 or both (officer-in-default being liable).

11. **For appointment of Inspections under Section 235 :** (a) *Applicant* : (i) 200 members ; (ii) Members holding not less than 1/10th of the total voting ipower. (In the case of a company not having a share capital not less than 1/5th n number of members.) (b) *Form* : No prescribed form—a letter being sufficient This letter must contain particulars prescribed in Rule 8 of the Companies (Central Govt.'s) General Rules and Forms, 1956. (c) *Enclosures* : (i) Documentary evidence in support of the statements made in the application as are reasonably open to the applicants ; (ii) An affidavit stating that paragraphs .....of the application are true to the knowledge and paragraphs.....to the best of their information and belief ; (iii) Security for such amount not exceeding Rs 1,000 as the Central Govt. may think fit ; (iv) Treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) The application to contain : the names and addresses of the applicants ; voting power held by each applicant if the company has a share capital ; the total number of applicants ; the total voting power, the reasons for requiring the investigation (Rule 8) ; (ii) The reasons to be precise and specific. (e) *Time limit* : None. (f) *Penalty for contravention* : Not applicable.

12. **For appointment of Inspector under Section 237 :** (a) *Applicant* : Company. (b) *Form* : None — a letter being sufficient. (c) *Enclosures* : (i) Documentary evidence, if any, in support of the applicant needs be submitted ; (ii) A copy of the Special Resolution passed at the company's general meeting ; (iii) Treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) In the case of failure of the management-in-charge to make the application within a reasonable time, shareholders themselves may do so ; (ii) Application to contain reasons for investigation and a copy of the Explanatory Statement sent to the members to be enclosed therewith. (e) *Time limit* : None. (f) *Penalty for contravention* : Not applicable.

13. **For obtaining a copy of the Inspector's Report under Section 241 :** (a) *Applicant* : (i) Company concerned ; (ii) Members of the concerned company ; (iii) Creditors ; (iv) Applicants requesting investigation. (b) *Form* : No prescribed form—a letter being sufficient (c *Enclosures* : (i) Evidence of status of the applicant ; (ii) Treasury challan duly receipted for the fee payable. (d) *Guidelines* : (i) The fee payable being 37 paise for every 100 words or part thereof,

the amount of fee is required to be ascertained first from the Govt. ; (ii) Only the final report (no interim one) is given by the Govt. (e) *Time limit* : None. (f) *Penalty for contravention* : Not applicable.

14. **For obtaining a copy of Inspector's Report on ownership of the company (Section 247) :** (a) *Applicant* : (i) Company ; (ii) Member ; (iii) Creditor. (b) *Form* : Not prescribed—a letter being sufficient. (c) *Enclosures* : (i) Evidence of status of the applicant ; (ii) Treasury challan duly receipted for the fee payable. (d) *Guidelines* : (i) Since the fee payable is 37 paise for every 100 words or parts thereof, the actual amount payable has to be first ascertained from the Govt ; (ii) Govt. is obliged to give only final (no adinterim) report; (iii) Govt. is not bound to furnish report in the presence of good reason for non-divulgence of the contents thereof. (e) *Time limit* : None. (f) *Penalty for contravention* : Not applicable

15. **For increasing number of directors (Section 259) :** (a) *Applicant* : Company (b) *Form* : No. 24 in Annexure A to the Companies (Central Government's) General Rules and Forms, 1956. (c) *Enclosures* : (i) A copy of the resolution passed at the compay's general meeting; (ii) a copy of the proceedings of the said general meeting with details of voting signed by signatories to the form ; (iii) Copies of the advertisements published in the newspaper ; (iv) A copy of the memorandum and articles of association ; (v) Treasury challan duly receipted for the prescribed fee, (d) *Guidelines* : (i) Only in the case of a public company or its private subsidiary is the approval required to be taken ; (ii) No approval is needed for increase in number of directors to 12 ; (iii) Prior to this application being made to the Central Government, a general notice has to be issued by or on behalf of the company to members thereof, indicating the nature of the application proposed to be made ; (iv) Such notice has to be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situated and circulating in that district and at least once in English in an English newspaper circulating in that district ; (v) Normally, the Central Government is guided by certain principles, viz., (a) the number of directors should be in proportion to the size of the unit and the nature of its business ; and (b) the proposed increase should be necessitated by the need for shouldering additional responsibilities and duties cast upon the Board and should not result in accommodating creditors by offering them directorship. (e) *Time limit* : Before increasing the number. (f) *Penalty for contravention* : Appointment or increase will not be valid.

16. **For approval to amendment of provision relating to managing, whole-time or non-rotational directors (Section 268) :** (a) *Applicant* : Company (b) *Form* : 25B [vide Annexure A to the Companies (C. G 's) General Rules and Forms, 1956] (c) *Enclosures* : (i) A copy of the resolution passed by the Board/the Company in general meeting ; (ii) One certified copy each of the *notice* published in the newspapers ; (iii) Copy of the memorandum and articles of association ; (iv) A copy of the revised version of the relevant articles ; (v) A copy of the agreement or resolution of the Board containing the provision ; (vi) Treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Approval being unnecessary for a private company which is not a subsidiary of a public company ; (ii) Approval being necessary even for making provision

regarding non-rotational directors to be appointed by the Govt.-owned financial institutions (except Industrial Finance Corporation of India); (iii) Prior to the application being made to the Govt., a general notice to be issued by or on behalf of the company to the members thereof, indicating the nature of the proposed application; (iv) Aforesaid notice to be published once in a newspaper in the principal language of the district where the registered office is situated and circulating in that district and at least once in English in English newspaper circulating in that district; (v) Guiding principles normally followed by the Government being —"A group of equity shareholders are not allowed to appoint directors not liable to retire by rotation because such right deprives the other members holding a majority of shares of their right to elect directors of their choice. Exceptions may be made in the case of foreign collaborations participating in equity shares. Even in the cases a condition that the foreign collaborators should not seek election of their representative out of the rotational quota of directors is made". (e) *Time limit*: None – the amendment not becoming valid till the obtaining of the approval. (f) *Penalty for contravention*: Does not arise.

17. **For appointment or reappointment of managing, whole-time director and manager** (Sections 269/311/388): (a) *Applicant*: Company. (b) *Form*: 25A [Annexure A to the Companies (C Govt.'s, General Rules and Forms, 1956]. (c) *Enclosures*: (i) A copy each of the agreements (if any existing and proposed); (ii) A copy of the memorandum and articles of association; (iii) A copy of the resolution of the Board or the company in general meeting; (iv) A certified copy each of the *notices* published in newspaper; (v) Particulars of remuneration drawn from any other company; (vi) Audited Accounts, Auditor's Report and the Directors' Report for the last 2 years; (vii) Treasury challan duly receipted for the payable fee. (d) *Guidelines*: (i) In the case of companies which have been newly registered but have not yet commenced business or whose accounts have not yet been audited, the following information/documents should be furnished, viz., A. One copy of the prospectus, if any, issued by the company; B Full particulars of the capital proposed to be raised in the near future and also the particulars of long-term loans which the company proposes to raise, indicating source of obtainment; C. The expected date of commencement of business and/or production; D. Consideration on which the proposed remuneration has been fixed; E. Estimated turnover and profits of the company during the next 3 years F. Whether the requisite licence (if any) under the Industries (Development and Regulation) Act has been obtained; G. Extent of foreign collaboration if there be any. (ii) Approval is required *only for* a public company or its private subsidiary (pure private company being excepted) (iii) Prior to the application being made to the Govt., a general notice has to be issued by or on behalf of the company to its members, indicating the nature of the application proposed to be made. (iv) Such notice has to be published once in a newspaper in the principal language of the district in which the registered office is situate and circulating in that district and at least once in English in an English newspaper circulating in that district (v) *The guiding principles normally followed by the Government*: A. In director-managed company, the general rule is that there should not be more than one managing director (by whatever name designated). Relaxation from this rule is made where the size of the company or the range of its activities justify the appointment of more than one managing director. B. Where a technical director is appointed in addition to a managing director, the functions

and duties of the former are closely scrutinized in the light of the objects of the company and the managerial powers, if any. with a view to ensuring that the company is not trying to evade the above rule. C. The quantum of remuneration payable to the managing director is determined after taking into consideration such factors as paid-up capital of the company, past profits and future prospects, quantum of dividend declared in recent years, size of the company and its total turnover, extent of managing director's interest in the company, nature of the duties and functions of the managing director and the nature of the business of the company. Also, the following factors are taken into account while deciding the remuneration of managing directors/directors, viz, financial resources of the company; past earnings of directors/managing directors compared with dividends declared and net profits earned by the company during the period; size and existing composition of the Board of Directors; additions, if any, to the usual duties and responsibilities of the managing directors; other amenities and benefits admissible to directors/managing directors under the existing articles and agreements. D. The existing practice followed in the company concerned is also taken into account while deciding remuneration and increases in the remuneration payable to directors/managing directors. E. Managing directors are not permitted to supplement their earnings with any buying or selling commission even with the sanction of the company concerned. Further the director is not allowed to have any indirect interest in selling agency through relatives or otherwise. (vi) The Central Government shall have regard to the following matters under Section 637AA, namely—the financial position of the company; the remuneration or commission drawn by the individual concerned/in any other capacity including his capacity as a sole selling agent; the remuneration or commission drawn by him from any other company; professional qualifications and experience of the individual concerned; public policy relating to the removal of disparities in income. (vii) The maximum remuneration within the statutory limits laid down by the Act payable to the managing, whole-time paid director/maneger in a public limited company has been fixed according to the latest guidelines in this behalf. (viii) Appointment of a person who is already whole-time director in one company will not be approved as paid director in another company. (ix) The latest Guidelines/Administrative ceiling on the perquisites etc., to be reproduced. (e) *Time limit*: Appointment is not valid, unless approval is obtained. (f) *Peralty for contravention*: Does not arise.

18. **For removal of disqualification of a director (Section 274)**: (a) *Applicant*: Company or the person concerned (b) *Form*: No prescribed form – a letter being sufficient. (c) *Enclosures*: (i) a copy of the judgment convicting the director; (ii) a copy of the memorandum and articles of association; (iii) treasury challan duly receipted for the prescribed fee. (d) *Guidelines*: (i) The letter to adduce reasons warranting the removal of dis-qualifications; (ii) In the case of the disqualification being for non-payment of call, the date of the subsequent receipt of the payment to be indiceted; (iii) Removal of disqualifications by the Central Govt. is permissible in the case of conviction of a director or proposed director by a Court of any offence involving moral turpitude and imposition of sentence of imprisonment not less than 6 months as well as in the case of non-payment of calls for 6 months. (e) *Time limit*: Before appointment. (f) *Penalty for contravention*: Appointment being invalid.

19. **For grant of loan, guarantee or security to or on account of Directors, etc. (Section 295)** : (a) *Applicant* : Company. (b) *Form* : No form—letter to contain particulars specified by the Govt. (vide guidelines below). (c) *Enclosures* : (i) a copy of the audited balance sheet and profit and loss account for the last 3 years of the company and where applicable borrowing company ; (ii) a copy of memorandum and articles of association ; (iii) a copy of the proposed agreement, if any ; (iv) a copy of the resolution of the Board or company in general meeting, as the case may be ; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Previous approval needed before granting the loan, guarantee or security. (ii) Guiding principles issued by the Central Govt —Each application to be considered on its merits, having regard to the following points, viz., purpose of the loan ; guarantee or security given or provided ; financial position of the borrower and the lending company ; and other relevant facts and circumstances, such as whether the lending company has surplus funds to lend, whether or not the loan is secured, whether the rate of interest offered is reasonable, whether the loan is for a definite period, whether the general financial position of the lending company is satisfactory, whether the individual borrower of the borrowing company or firm is fully solvent, and if the borrower is a company, whether it has a good profit record. (e) *Time limit* : Before grant of loan or financial assistance. (f) *Penalty for contravention* : (i) Fine up to Rs. 5,000 or simple imprisonment extending to 6 months ; (ii) Liability to repay jointly and severally—persons knowingly a party to the contravention being liable.

20. **For obtaining the previous approval for entering into contracts with the company for the sale, purchase or supply of any goods, materials or services [Section 297 (1)]** : (a) *Applicant* : Company. (b) *Form* : 24A. (c) *Enclosures* : (i) a copy of the agreement, if any ; (ii) a copy of the Board resolution approving the contract ; (iii) a copy of the memorandum and articles association ; (iv) a copy of the balance sheet for the last 3 years ; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Previous approval to be obtained. (ii) No approval being necessary in the case of supply of professional services as well as in the case of managing/whole-time director. (iii) Prevailing market rates and reasons for valuation in rates (if any) to be indicated. (e) *Time limit* : Before execution. (f) *Penalty for contravention* : Not specified (Persons liable being not specified).

21. **For relaxation of restrictions relating to interested directors taking part in the discussion or voting (Section 300)**: (a) *Applicant*: Company. (b) *Form*: Not prescribed—a letter being sufficient. (c) *Enclosures*: (i) a copy of the memorandum and articles of association; (ii) a copy of the latest balance sheet; (iii) treasury challan duly receipted for the prescribed fee. (d) *Guidelines*: (i) The relaxation is needed only in the case of a public company or its private subsidiary. (ii) Approval will be given only in public interest, keeping in view the desirability of establishing or promoting any industry, business or trade. Therefore, the letter must warrant the seeking of exemption (iii) The alternative step is to obtain the approval of the company in general meeting. (e) *Time limit* : Before discussing the matter at the Board meeting. (f) *Penalty for contravention* : Fine up to Rs. 5,000. Further the resolution will be invalid (directors who contravene knowingly being persons liable).

22. **For approval for payment of remuneration at more than 5% or 10% of the profits, as the case may be (Section 309):** (a) *Applicant*: Company. (b) *Form*: 25C. (c) *Enclosures*: (i) a copy of resolution of the Board/company; (ii) a copy of the memorandum and articles of association; (iii) a copy of the agreement with the managing/whole-time director; (iv) one copy each, of the accounts, director's report, auditors' report for the last two years; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* (i) Approval is required only in the case of a public company or its private subsidiary. (ii) Approval must be obtained only where it is proposed to make payment of remuneration at more than 5% of the net profits to a managing/whole-time director or 10% to more than one. (iii) The computation of net profits is governed by Section 349. (iv) Full justification for the payment of minimum remuneration should be given. (v) In the event of the managing/whole time director being entitled to remuneration by way of monthly salary, and commission, he can only draw monthly salary where there is no profit or inadequate profit (vi) The payment of minimum remuneration is considered on merits, due regard being had to the company's nature of business and the functions of the managing/whole-time director. (vii) While fixing minimum remuneration, account is taken of : size of the company; nature and extent of its operations; the number of managing/whole-time directors together with their assigned powers; whether the remuneration proposed is necessary for the efficient management of the company. (viii) It is usual to apply for minimum remuneration at the same time when the application for approval of appointment/re-appointment is made. However, the Govt. may not give any such general approval, and if the approval is granted, it is normally for 3 years. (e) *Time limit*: Before payment or as soon as the profits are ascertained (f) *Penalty for contravention* : (i) Excess to be refunded by managing/whole-time director. (ii) No penalty specified by the Section.

23. **For payment of commission at more than 1% or 3% to a director (Section 309):** (a) *Applicant* Company (b) *Form*: Not prescribed—a letter being sufficient. (c) *Enclosures*: (i) a copy of the special resolution; (ii) a copy of the memorandum and articles of association; (iii) one copy each, of the accounts, etc., for the last 2 years; (iv) treasury challan duly receipted for the prescribed fee. (d) *Guidelines*: (i) Approval is need only in the case of a public company or its private subsidiary. (ii) Commission in excess of the limits may be allowed if the directors were drawing the same before. (iii) Payment of commission must be fair and equitable regard being had to the responsibilities shouldered by the directors and the circumstances of the company. Normally, it is stipulated that the commission so paid should be divided between all directors equally or in such proportion as they may unanimously decide in each case. (iv) Payment of remuneration by way of commission to the directors is generally allowed only when the directors actually render sarvices to the company on a part-time basis, over and above the services rendered by attending Board Meetings ; in case of services rendered by attending Board Meetings only, payment of remuneration other than sitting fees must be justified. (v) Since the duties of a director in the ordinary course include signing of share certificates, he cannot get extra remuneration for it. But in the case of special issues involving the signing of a large number of share certificates, extra payment therefor may be considered as special case. (e) *Time limit*. Before payment. (f) *Penalty for contravention*: No penalty as such. But excess money has to be refunded by concerned directors.

24. **For increasing remuneration paid to a director/managing director/manager (Sections 310-11)** : (a) *Applicant*: Company. (b) *Form*: No. 26. (c) *Enclosures*. (i) a copy each of the existing and proposed agreement; (ii) a copy of the resolution of the Board/company in sanctioning the increase ; (iii) two certified copies each of the notices in newspapers; (iv) a copy each of the balance sheet for the last 2 years; (v) a copy of the memorandum and articles of association; (vi) treasury challan duly receipted for the prescribed fee (d) *Guidelines*: (i) The increase in the remuneration has to be fully justified. (ii) Approval is not necessary in the case of a private company. (iii) Where the company proposes to increase the remuneration by absorbing commission on net profits into salary, the application is considered on merits taking into account the past performance of the individual size of the unit, nature and extent of company's operation, its working results and the effect of the proposed increase on the operation of Section 198 in regard to the minimum managerial remuneration. Ordinarily, any proposal for absorption of element of commission into salary is not recommended for approval; when the absorption is allowed, such absorbed commission should not ordinarily exceed the average of the individual concerned by way of commission during the immediately preceding 5 years. (iv) Increase in sitting fees of directors or payment of fixed conveyance or other allowances is considered on the merits of each case. The main guiding factor in such cases will be the decision of the shareholders except in cases where the proposed increase or payment is grossly exceeding having regard to the previous scales of fees and allowances. (v) The guidelines given under notes to Form 25A also are, *mutatis mutandis*, applicable. (vi) In the case of re-appointment on increased remuneration, Form 25A must also be submitted (vii) Approval is not required where the increase results in enhancement of the sitting fees up to Rs. 250/- only (e) *Time limit* : Before payment. (f) *Penalty for contravention* : Not specified.

25. **For approval to waive recovery of excess remuneration paid to a director (Section 309)** : (a) *Applicant* : Company. (b) *Form* : Not prescribed—a letter being sufficient. (c) *Enclosures* : (i) a copy of the resolution of the Board/ company; (ii) a copy of the memorandum or articles of association; (iii) a copy of the accounts in relation to which excess remuneration was paid; (iv) a copy of the agreement if any; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Approval is required only in the case of a public company or its private subsidiary. (ii) The director who has received excess remuneration is deemed to have held it in trust for the company till waiver is permitted. (iii) Reasons for requesting waiver should be given in detail. It should be explained why prior approval under other sub-Sections, where necessary, was not obtained. (e) *Time limit* : Before waiver. (f) *Penalty for contravention* : Excess to be refunded by the recipient.

26. **For obtaining prior consent for holding by certain persons of any office or place of profit [Section 314 (1B)]** . (a) *Applicant* · Company. (b) *Form* : 24B (c) *Enclosures* : (i) a copy each of balance sheet for last 3 years; (ii) a copy of the draft agreement proposed to be entered into; (iii) a copy of the special resolution; (iv) a copy of the memorandum and articles of association; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Approval is necessary only where the office or place of profit in the company carries a total monthly

remuneration of not less than Rs. 3,000. (ii) An office or place of profit shall be deemed to be such if the person obtains from the company anything by way of remuneration whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence or otherwise. (iii) *Persons specified* are : partner or relative of a director or manager; a firm in which a director, manager or a relative of such director is a partner; a private company of which such director, manager or relative of either is a director or member. (iv) Prior approval of the company in general meeting and the Central Government required (e) *Time limit* : Before appointment (f) *Penalty for contravention* Refund of remuneration or monetary equivalent or perquisites or advantage enjoyed (recipients thereof being liable)

27. **For appointment as managing director a person who is already holding such post in 2 companies (Section 316) :** (a) *Applicant* : Company. (b) *Form* : No prescribed form. But since Section 269 is also attracted, Form 25A should be used. (c) *Enclosures* : (i) a copy of the memorandum and articles of association; (ii) a copy of the resolution of the Board/Company in general meeting; (iii) copies of the audited accounts, auditors' report and directors' report for the last 2 years; (iv) copies of the notices published in the newspapers (under Section 640B read with Section 269); (v) a copy of the existing and proposed agreement; (vi) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) All the guidelines under Section 269 (for Form 25A) will be applicable. (ii) Full justification for appointing the person should be given so as to satisfy the Govt. that it is necessary for the companies to have a common managing director, so that they can, for their proper working, function as a single unit. (iii) A person can be appointed managing director for any number of private companies which are not subsidiaries of public companies. (iv) In the interest of better corporate management, the C.L.B. will not ordinarily approve a person's appointment as managing director in 2 companies which are both of a large size and where it is felt that the same persons may not adequately discharge the respossibilities of the second charge. But in cases where companies are small in size or engaged in more or less allied business and/or are situated in the same area, the Board may, for the purpose of efficient and more economical management of the 2 companies, approve a common managing director, but in that event, the remuneration approved for the appointment in the second company will be regulated suitably. (e) *Time limit* : Before appointment. (f) *Penalty for contravention* : Not specified by the Section.

28. **For approval for giving loans beyond 20% or 30% of the aggregate of the paid-up capital and free reserves (Section 370) :** (a) *Applicant* : Company. (b) *Form*: 34AA. (c) *Enclosures* : (i) a copy of the special resolution; (ii) a copy each of the annual reports and annual accounts of both the lending and the borrowing companies for the immediately preceding year; (iii) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) Approval is required in case of a public company or its private subsidiary if the loans made to all bodies corporate exceeds 20% of the aggregate of subscribed capital and free reserves (under the same management) or 30% (not under the same management). (ii) Special resolution should disclose material terms including name of the borrowing company, amount of proposed loan, nature and value of security offered and the rate of interest

proposed to be charged. Alternatively, a clear limit for lending in excess of the prescribed limits should be specified; in such a case full details of the loan should invariably be given in the application. (iii) Consideration of the merits, having regard to the purpose for which loan is granted; financial position of the companies concerned and other relevant facts and circumstances of the case, e.g., whether the lending company possesses surplus funds to lend; whether or not the loan is secured; whether the rate of interest offered is reasonable; whether the loan is for a definite period and whether the borrowing company has a good profit record. (iv) Reserve Bank's permission is necessary for lending any money to any company or firm which is directly or indirectly controlled by residents outside India or to any person controlling any such company or firm Without permission of the Reserve Bank or Central Govt., a guarantee in respect of any debt, obligation or liability of a person resident outside India cannot be given. A banking company is exempted. (e) *Time limit* : Before granting loan (f) *Penalty for contravention* : (i) Fine up to Rs. 5,000 or simple imprisonment up to 6 months; (ii) Joint and several liability to repay. (g) *Persons liable* : (i) Party to the contravention : (ii) Persons knowingly a party to the contravention.

29. **For purchase by companies of shares of other companies (Section 372)** : (a) *Applicant* : Company. (b) *Form* : 34B. (c) *Enclosure* : (i) a copy of the resolution passed by the company in general meeting together with a copy of the resolution of the Board approving the investment; (ii) a copy each of the memorandum and articles of association of the company and of the other body corporate; (iii) copies of the balance sheets of both the company and the other body corporate for the last 3 years; (iv) a copy of the prospectus (if any) issued by the other body corporate; (v) treasury challan duly receipted for the prescribed fee (d) *Guidelines* : (i) Approval is not required for investment by a private company which is not a subsidiary of a public company. (ii) In other cases approval is required only where the investment exceeds the limits prescribed by Section 372 (iii) The limit of 30% to an investment company, i.e., a company whose whole or substantially the whole business is the acquisition of shares, stock, debentures or other securities. (iv) The prescribed limits are not applicable to rights shares. (v) The Govt. will not normally accord *ex post facto* approval to any investment. (vi) The power of the Board to invest in any shares cannot be delegated and must be exercised only at a meeting of the Board. (vii) The application should make out a case that the investment is prudent and in the interest of both the companies. (e) *Time limit* : Before investment. (f) *Penalty for contravention* : Fine up to Rs. 5,000 (officer-in-default being liable).

30. **For Appointment of same person as manager of more than 2 companies (Section 386)** : (a) *Applicant* : Company. (b) *Form* : Though none, prescribed yet Form 25A should be used, as appointment is involved. (c) *Enclosures* : (i) a copy of the memorandum and articles of association; (ii) a copy of the resolution passed by the Board/company in general meeting; (iii) copies of the audited accounts, auditors' report and directors' report for the last 2 years; (iv) copies of the notices published in the newspapers (under Section 640B read with Sections 269 and 388); (v) a copy of the existing and proposed agreement; (vi) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* ;

Guidelines relating to managing director (under Section 316) apply *mutatis mutandis*. (e) *Time limit* : Before appointment. (f) *Penalty for contravention* : None under the Section.

31. **For payment of remuneration to a manager exceeding 5% of the net profits (Section 387) :** (a) *Applicant* : Company. (b) *Form* : 25C. (c) *Enclosures* : (i) copy of the resolution of the Board/company; (ii) a copy of the memorandum and articles of association; (iii) a copy of the agreement, entered into with the Manager; (iv) one copy each of the accounts, director's report and auditors' rep rt for the last 2 years; (v) treasury challan duly receipted for the prescribed fee (d) *Guidelines* : Application *mutatis mutandis* of the same as relate to managing/whole-time director under Section 309. (e) *Time limit* : Before appointment. (f) *Penalty for contravention* : None under the Section

32. **For appointment/reappointment of a person as a manager (*Section 388*) :** (a) *Applicant* : Company. (b) *Form* : 25A. (c) *Enclosures* : (i) a copy of the resolution of the Board/company; (ii) a copy of the memorandum and articles of association; (iii) a copy of the agreement with the manager; (iv) one copy each of the accounts, auditors' report and directors' report for the last 2 years; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : Application *mutatis mutandis* of the same as relate to managing/whole-time director under Section 269. (e) *Time limit* : Before appointment. (f) *Penalty for contravention*: None under the Section.

33. **For increase in remuneration of manager (Section 388) :** (a) *Applicant* : Company. (b) *Form* : 26 (c) *Enclosure* : The same as under Section 310/311 relating to managing/whole-time director. (d) *Guidelines* : Application *mutatis mutandis* of the same as relate to managing/whole-time director under Section 310/311. (e) *Time limit* : Before appointment. (f) *Penalty for contravention* : None specified under the Section.

34. **For approval of amalgamation in public interest (Section 396) :** (a) *Applicant* : Company. (b) *Form* : None prescribed—a letter being sufficient. (c) *Enclosures* : (i) a copy of the scheme of amalgamation if any; (ii) copies of the balance sheets of the transferor and transferee companies for the last 3 years; (iii) copies of the resolutions, if any, passed by the Board/companies concerned; (iv) copies of the memorandum and articles of association of the companies concerned; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines* : (i) The Central Govt. is empowered not only to act on the appli cations of the companies concerned but also on its own volition; (ii) Approval of the Cout is not necessary. (iii) The letter has to explain why recourse to the procedure of obtaining Court's approval is not being had (iv) The procedure is normally followed in the case of Government companies. (e) *Time limit* : None. (f) *Penalty for contravention* : Does not arise.

35. **For disposing books and papers of an amalgamated company (Section 396A):** (a) *Applicant*: Transferee company. (b) *Form*: None a letter being sufficient. (c) *Enclosures*: (i) a copy of the order of amalgamation; (ii) a copy of the Board resolution in regard to disposal of books and papers; (iii) treasury

challan duly receipted for the prescribed fee. (d) *Guidelines*: (i) If the books and papers for a period earlier than the expiry of 5 years are being destroyed, full resons should be given for making the request (ii) Where the official liquidator has already examined the books and papers, a copy of his report should be sent. (e) *Time limit*: Before disposal. (f) *Penalty for contravention* None prescribed.

36. **For exemption of branch Audit, to the Central Government [Section 228(4) The Companies (Branch Audit Exemption) Rules, 1961]**: (a) *Applicant*: Company. (b) *Form*: Prescribed in Annexure to the companies (Branch Audit Exemption) Rules (c) *Enclosures*: (i) certificate signed by the managing director or managers (as the case may be) to the effect that arrangements have been made for audit of the accounts of the branch office by a person otherwise qualified for appointment as branch auditor, even though such person is an employee of the company; (ii) a written statement from the auditor of the company that, in his opinion, arrangement made for the audit of the accounts of the branch office are adequate and that the arrangements for the keeping of the accounts thereof are such as would enable person auditing the accounts to certify that they show a true and fairview of the branch office; (iii) a copy of the resolution of the company relating to the proposal to apply for exemption and explanatory statement in connection therewith; (iv) a copy of the latest audited balance sheet and profit and loss account of the company; (v) treasury challan duly receipted for the prescribed fee (d) *Guidelines*: (i) An application for exemption has to be made only by those companies which do not qualify for exemption based on quantum of activity under r 3 of the rules. (ii) Against Item No 3. of the Application Form, the branch offices in respect of which exemption from audit is sought and branch offices which are exempted from audit in terms of r. 3 of the Rules should be separately indicated. (iii) The enclosures (i) & (ii) above are required only where exemption is sought on the grounds specified in r. 4(1) (a) of the said Rules (iv) Exemption may also be sought on other grounds mentioned in r. 4(1). (v) The Central Government may, before granting the approval, appoint an enquiry officer to consider the circumstance of the case. (e) *Time limit*: Before publication of balance sheet (f) *Penalty for contravention*: None specified by the Section.

37. **For approval to appointment of sole selling agents (Section 294AA)**: (a) *Applicant*: Company. (b) *Form*: Form I under the Companies (Appointment of Sole Selling Agents) Rules, 1975. (c) *Enclosures*: (i) certified true copies of annual accounts for the last 3 financial years; (ii) a certified true copy of the proposed agreement; (iii) a copy of the special resolution passed under S. 294AA(3) where applicable; (iv) Certified true copy of the resolution passed under Section 297 where applicable; (v) treasury challan duly receipted for the prescribed fee. (d) *Guidelines*: (i) Approval is required for appointment of any individual, firm or body corporate who or which has substantial interest in the company as well as the appointment by a company having a paid-up share capital of Rs. 50 lakhs or more (ii) Substantial interest has been defined in Explanation to Section 294AA. (iii) For appointment of a foreign company or foreign controlled company approval of the Reserve Bank is essential under the FERA. (iv) It would be sufficient if particulars regarding agency arrangements and territories are given only in respect of the product for which proposed appointment is being made.

Detail in respect of other products need not be given. (v) Where particulars, being lengthy, cannot be given in the form itself, they may be given as annexure. (e) *Time limit*: Before appointment. (f) *Penalty for contravention*: None under the Section.

38. **For approval to appointment of sole buying (or purchasing) agents (Section 294AA)**: (a) *Applicant*: Company. (b) *Form* : Form II under the Companies (Appointment of Sole' Agents) Rules, 1975. (c) *Enclosures*: (i) certified true copies of the last 3 years annual accounts; (ii) a certified true copy of the proposed agreement; (iii) a copy of the special resolution under Section 294AA(3) where applicable passed under Section 297. (d) *Guidelines* : Same as mentioned in the preceeding paragraph (e) *Time limit* : Before appointment (f) *Penalty for contravention* : None specified under the Section.

Presenting final accounts : Students should consult Study Paper No 5 in *Advanced Accounting*.

STOCK EXCHANGE

The secretary of a company is expected to be fully conversant with the working of stock exchanges as, often, the company may have to purchase and sell shares, debentures and government securities. He must also keep a watch over the prices that the shares of the company itself command and over any unhealthy development such as an attempt by someone to secretly purchase a large block of shares.

Definition : The Securities Contracts (Regulation) Act, 1956 defines a Stock Exchange as "an association, organisation or body of individuals, whether incorporated or not, established for the purpose of assisting, regulating and controlling business in buying, selling and dealing in securities."

The securities market, popularly known as Stock Exchange, is a highly organised market in which government securities, stocks and shares are dealt in A Stock Exchange has all the characteristics of a market in the economic sence here the investors have an opportunity to shift their investment at their will. But for this opportunity, capital accumlations would not have been what they are at present. Stock Exchange forms the nucleus around which the different components of the financial market rotate and get nourishment. It forecasts the financial climate and reflects and psychology of investment. That is why it is dubbed as the barometer of indusrial conditions reflecting the current position.

The following exchanges have so far been recognised by the Government under Section 4 of the aforementioned Act.

(i) The Stock Exchange, Bombay.
(ii) The Ahmedabad Share and Stock Brokers' Association, Ahmedabad.
(iii) The Calcutta Stock Exchange Association Limited, Calcutta.
(iv) The Madras Stock Exchange Limited, Madras
(v) The Delhi Exchange Association Limited, New Delhi
(vi) The Hyderabad Stock Exchange Limited, Hyderabad.
(vii) The Madhya Pradesh Stock Exchange, Indore.
(viii) The Bengalore Stock Exchange, Bangalore.

Recognition of only one exchange each at Bombay, Ahmedabad and Calcutta, where more than one were functioning, is in pursuance of a policy decision taken by Government to recognise only one exchange at one place, as that would make for effective control, both external and internal, over the activities of the recognised exchange.

Dealings on the Stock Exchange

Management: The management of affairs of each stock exchange is vested in an executive committee. Its composition and powers vary from one exchange to another. The executive committee is differently designated at different exchanges. All such committees must also include certain number of Government nominees.

The conditions, the manner, and the procedure relating to the conduct of business and trading at the exchanges are laid down in detail in the rules and bye-laws of the exchange which must, in the interests of all concerned, be enforced by the governing bodies of the exchanges with impartiality and rigidity.

Membership: Business at a stock exchange can be transacted only by its members, since they alone are permitted to trade in the exchange. Kerb trading has been prohibited and outsiders who are not members of the stock exchange, are not allowed to enter the dealing hall of the exchange. Any intending buyer or seller of securities, therefore, has necessarily to contact a member of the stock exchange to transact business on his behalf.

The tone and quantity of market obviously depends on the members of the stock exchange. The Gorwala Committee observed that a member should (i) be intelligent and well informed; (ii) possess a sense of responsibility towards society; and iii) had adequate resources at his disposal. In other words, members should be men of means, integrity, experience and knowledge. Each stock exchange has its own regulations for screening its applicants for membership—a rigorous check is made before one is accepted as a member.

To be a member of any exchange in India, a person has to pay entrance fee, make membership deposits and pay annual subscription over and above the acquisition value of one share or one membership card in some cases. As regards membership deposits, the amount has been fixed at Rs. 20,000 for the Bombay and Calcutta Exchanges, Rs. 5,000 for Madras and Ahmedabad Exchanges and Rs. 3,000 for Hederabad and Indore Exchanges As regards enterance fees, the amount stands at Rs. 10,000 in the case of Calcutta, Rs. 2,500 in Madras, Rs. 2,571 in Hyderabad, Rs 1,601 in Ahmedabad, Rs 1,100 in Indore and Rs 500 in Delhi In addition, the value of each share comes to Rs. 6,000-7,000 in the case of the Calcutta and Delhi Exchanges, and to Rs. 1,800 in Ahmedabad. For the Bombay Exchange, there is one aggregate card value amounting to Rs. 17,500 without any separate charge for entrance fees or share value. Thus, the membership cost, excepting the small amount of annual subscription, comes to Rs 37,000 on the Calcutta Exchange, Rs 7,500 on the Madras and Delhi Exchanges, Rs. 8 401 on the Ahemdabad Exchange, Rs. 5,571 on the Hyderabad Exchange and Rs 4,100 on the Indore Exchange. However, the card or the ticket hold by a member is highly

valuable; one is acquired to purchase a ticket from an existing member if one wants to be a member of the Stock Exchange.

Dealings in listed securities only : Dealings on the exchange are permitted only in securities listed on the exchange The governing bodies of the exchanges are, however, empowered also to permit dealings in such other securities as are officially listed at some other stock exchange.

Permission for dealings in the securities of a company, on the exchange is not granted by an exchange, unless the company has complied with the various listing conditions and requirements prescribed by the exchange. (For a brief and illustrative summary of the more important requirements, students should refer to Appendix I at page 61.) As to the details of these listing conditions they should refer to Rule10 of the Securities Contracts (Regulation) Rules, 1957 and Regulation No. 2 of the Regulation of the Stock Exchange, Bombay.

No listing of Government securities is necessary, for they are deemed to have been admitted into dealing right from the date of their issue.

Cleared Securities List : *For trading at the exchange, the listed securities are* divided into two groups—one in which forward trading is permitted and the other in which it is not. Securities of only those companies which are of sufficient magnitude and importance and in which there is an adequate public interest. are put in the first group, i e , the forward list or cleared securities list. Only cash dealings are permitted in the case those securities which are not included in the forward list.

Brokers and Jobbers: Members of a Stock Exchange may be divided into two groups, viz, brokers and jobbers. A broker is an agent of the operators and he deals with the public in buying and selling shares of securities on their account. The jobber is a person who deals on his own account and has no direct contract with the general public. It is from him that the broker buys and to him that he sells the securities. A jobber who usually specialises in a particular class of shares or securities. e g , government securities, bank shares, mining shares, industrial shares, etc. makes a price in the securities he deals in. The expression 'making a price', implies, in fact, the quotation of two figures. one (the lower) at which he will buy, and the other (the higher) at which he will sell The difference between the two prices is profit one is known as the jobber's turn.' It is not, however, necessary that the jobber must fix a price; he may even bid for stocks or he may offer them.

The operations of the jobbers, who are always there to buy or sell, afford the market is breath and its continuity. Besides. they act in such a way as to absorb the stock which violent price fluctuations emit forth.

The London Stock Exchange is, practically, the only market where members are divided into the two well defined classes as aforesaid, with clear-cut functions for each class The reputation that the London Stock Exchange has earned and the promirert position that it has come to occupy as an international finance centre, have been virtually due to the system of jobbers operating there.

Jobbers, as an institution, do not exist in India. There is, however, something like an unofficial division of the members on the Bombay Stock Exchange between commission brokers and 'travaniwalas' who mostly operate on their own account. But this is not a rigid division, as a broker is not precluded from dealing on his own account and neither is the 'travaniwala' from acting as a broker.

Option or 'Mandi Tezi': An option dealing is a transaction on the Stock Exchange whereby a person buys an option either to purchase or to sell certain number of shares or a certain amount of stock on a certain day in future at a fixed price in advance. Consideration is payable fo. the pur.hase of an option and is calculated either at a fixed rate per share or at a percentage of the value. In other words, option dealings consist in paying a su n of money to acquire the right to deal in a specified amount of security at an agreed price during a definite period. The buyer and the seller of the option are known as the 'holder' or 'giver' and 'maker' or 'taker' respectively ; the money, paid by way of consideration, by one to the other for acquiring the option or the right to deal is described as 'option money'.

An option is of three kinds: e g., 'put option', 'call option' and 'double option'. An option to purchase share is known as 'call option' (Tezi) while an option to sell is known as 'put option' (Mandi). A double option, known as the 'put and call' (Tezi Mandi) is one whereby the purchaser of the option has a right either to buy or to sell a specific number of shares whichever course he considers most profitable, having regard to the market conditions. It may be noted that the consideration in the case of double option, is double the amount for a single option.

The option rights thus are firm offers of dealers in shares to either by or sell a specific number of shares of a company, given for consideration, which can be availed of within a limited period. For example, a call option for 100 shares of Indian Iron & Steel Co , may be purchased for the month of January 1979, by an option of Rs. 200/- when the prevailing rate is, say Rs 25/- per share. If during the month, the price of share moves up to say Rs. 28/- he would buy 100 shares at Rs. 25/- and would sell them at Rs 28/- and thereby would make a profit of Rs 100/-, after recovering back the amount laid out on the purchase of the option. If, however, the price of shares continues to be Rs. 25/-, the operator shall lose the entire amount laid out on the purchase of the option.

N B *By Section 20 of the Securities Contracts (Regulation) Act, 1965, dealing in options has been made illegal*

Blank transfers : In order to effect a transfer of shares, the seller of the shares is required to make over to the buyer the share certificate(s) together with a transfer deed or deed only stamped and signed by him. The deed of transfer in the prescribed form (a common form of transfer is being used by all companies) contains particulars such as the name of the company, the number of shares and their distinctive numbers, the consideration money, the names and addresses of the sellers and the buyers, date of sale, date of original allotment or acquisition etc.

If on a deed of transfer, all the necessary particulars have been filled in,

including the signature of the transferor except the name, address and signature of the transferee, it is called a 'blank transfer' form. Certificates of title of securities (scrip) accompanied by such blank transfers readily pass through hands inasmuch as the real ownership also changes from one person to another, the change of ownership in each each case being beneficial. In order to have the legal ownership transferred in his favour, the holder of the documents is required to complete the deed of transfer by inserting all the remaining particulars, e.g., his name and signature as transferee, and to send the documents to the company concerned to have the change in the ownership registered. The company in its turn is required to record and enter the change in the ownership in its registers and also to duly endorse the share certificates to the effect It is only when all the requirements prescribed by Section 108 of the Companies Act are complied with that the ownership in the securities will be deemed to have been legally transferred. Section 108 (IA) of the Companies Act is also relevant; it insists that the shares should be registered wirhin a period of two months.

The Securities Contracts (Regulation) Act, 1956. has restricted the period of currency of blank transfer to a maximum of six months.

Methods of Trading

(*1*) *Selection of a Broker*: Membership of a stock exchange being essential for dealing on a stock exchange, shares and other securities can only be purchased through a share broker who is member of the stock exchange on which the shares or securities proposed to be acquired are quoted. He may be engaged either directly or through the medium of the bank with which the prospective investor has dealings The last course is generally preferred, since success in investment to a large extent depends on the broker, the correctness of the advice tendered by him. promptness with which he executes the orders and the honesty and integrity of his dealings

A broker, normally, does not accept a client unless he has been recommended by a person known to him. It is a precaution he takes against amounts falling dues for recovery from the client, not being realised.

(*2*) *Placement of orders* : Before the investor decides to place an order for the purchase of shares or any other security he seeks the broker's advice It being an important function of a broker, he can be relied upon as possessing knowledge of the factors affecting the maket value of securities. He is, therefore, able to judge whether a security is under or over-valued and the course of its price is likely to take in future. Ordinarily, a broker recommends for purposes of investment a number of securities and indicates, in each case, the advantages and disadvantages found in it, the risk involved anticipated return and prospects of appreciation and depreciation. On the basis of the advice of the broker, the investor draws up an order wherein he generally specifies the price at which the different securities may be purchased. At times, when the security is subject to wide fluctuations in price, he leaves the price open, i.e., to the discretion of the broker provided he has faith in his honesty and judgment

(*3*) *Steps that a broker takes to purchase securities for his client* : A member of a Stock Exchange may purchase or sell shares either on his own account or for his client. In the first case, he acts as jobber and in the second as broker.

However, under Section 15 of the Securities Contracts (Regulation) Act, 1956, a member is precluded from entering into a contract as a member with any person except with another member of the stock exchange. This provision has been made to ensure that a broker would not pass on his purchases or sales to his clients at a higher price to make a profit.

Since the members of a Stock Exchange in India are not divided into brokers and jobbers, the most common method followed for making purchases is that the broker who has an order for purchase announces his requirement by 'shouting' in the hall during the time allotted for dealings in the particular class of shares or securities. While doing so he announces the particulars of the securities, the quantity required and the price at which he is willing to purchase the same. In response thereto another broker who has an order to sell the same shares or securities, either accepts the offer or makes a counter-offer. In the process, a bargain is struck. The alternative course to shouting or announcing the demand is that the broker who has an order to purchase a security contacts one or other members of the Stock Exchange, and negotiates the purchase.

Each broker has a book with him known as *Sanda Book*, on which he obtains the signgture of the broker from whom he has bought or to whom he has sold any shares or securities in confirmation of the purchase or sale At the end of each day, every broker submits a copy of the transactions recorded in his book to the stock exchange for purposes of reconciling that all the transactions for purchase correspond with sales and *vice versa*. After the shares or securites have been bought, the broker prepares a Contract Note and forwards the same to his client.

Subsequently, on the settlement day, the broker takes delivery of the shares or securities and pays for them in cash. Then he recovers the cost of the shares or securities from his client.

(*4*) *Commission* : Every broker charges a commission according to the schedule of minimum brokerage fixed by the Stock Exchange authorities. Though a broker is allowed to share his commission with other brokers, sub-brokers and authorised clerks, he is not allowed to have any type of competition with them so far as rates of their shares of the brokerage are concerned.

(*5*) *Types of bargains* : Bargains or purchase and sale contracts on a Stock Exchange are of the following types :

(i) for spot delivery;
(ii) for ready delivery; and
(iii) for "the account" or for the clearing.

The spot delivery contracts are settled by the seller delivering the scrips and the buyer making payment therefor either on the contract being entered into or on the next day. The ready delivery contracts are, usually, settled likewise within 14 days from the date of the contract. The bargains entered into for "the account" or for the clearing are settled on the settlement date. The period for settlement of such contracts is not the same at each Stock Exchange and extends from 15 days

to a month. On the Bombay Stock Exchange, the settlement is fortnightly and this practice is now being gradually adopted by other Stock Exchanges also.

The main distinction between the "spot" and "ready delivery" contracts and those entered "for the account" is that the last-mentioned category of contracts can be carried forward to the next settlement if the purchaser or the seller desires to do so, i.e., there is a facility for carrying forward these contracts, which is popularly known as Budla facility.

Budla is a practice whereby outsanding contracts are settled at price fixed by the committee of the Stock Exchange on the settlement date, and in lieu thereof fresh contracts are entered into for the next settlement, at the closing prices of the last settlement. On a Budla taking place, the purchaser has to pay the seller, in addition to the difference in the price of the security which may have occurred up to the settlement date, an amount for the facility of carrying on the contract, known as 'contango' Conversely, if the contract for sale of security is not completed and is carried over to the next settlement, for such a facility the seller is paid by the buyer an amount which is known as 'backwardation'. At times, the technical position of the market may be such that there are more sellers than buyers. In such a case, instead of the purchaser having to pay a cotango, he receives an amount and, correspondingly, the seller. instead of receiving a consideration for allowing accommodation for the contract to be carried forward, has to pay.

The settlement of numerous transactions entered into on a Stock Exchange is made through the Clearing House attached to it; thereby the necessity of each bargain having to be settled individually between the members is obviated The members submit to the Clearing House the balance sheet of their individual purchases and sales, over the entire period of account and either pay or receive the net balance of securities and/or moneys due to them or payable by them, as the case may be.

It would thus appear that settlement of transactions on a Stock Exchange, except in the case of "on the spot" and "delivery contracts" takes place through the Clearing House.

Account means the period existing between two settement days. The phrase 'for the account' refers to forward business; it may also relate to the process by which such forward bargains are settled.

Stock Exchange Phraseology :

Bull or long : A bull is an operator who purchases a security in the hope of being able to sell it later at a higher price and thus make a profit in the bargain. Normally, a bull has no intention to take up delivery of the security that he purchases, the idea behind such a purchase being to sell the security as far as possible, before the settlement day at a higher price. If the expectation of the bull about a rise in price comes about, he sells out the security and makes profit. On the other hand, if the price falls against his expectation, he has to pay the difference as a loss However, he need not necessarily close a deal before the settlement day since he has

the option to either close a deal or carry it forward to the next date of settlement, usually by paying contango. Such an operator is so called because he shows in his activity the tendency of the bull to raise the price of a security in the air, by constantly trying to raise the price of a security in the share market. A bull's position in the market is also known as a long position.

Bear: A bear is one who sells short, i.e., he sells what he has not got. He does so in the hope of being able to buy what he has sold, at a lower price and thereby makes a profit in the bargain. If the price falls according to his expectation, the operator gains; if not, he is forced to buy back securities at a price higher than that at which he sold them and thereby incurs a loss. Like a bull, he has the option either to close his business at the end of an account and carry over the same to the next settlement date with a backwardation charge. A bear's position in the market is referred to as short position.

Stage (premium hunter): A stag is kind of bull and the term has a particular application in relation to new issues. He is an operator who applies for securities being issued for the first time with the object of selling them as soon as he is able to get a premium. His intention is not to invest more than the application money as he hopes to sell even before the allotment money became due. In this way, he can apply for a bigger allotment than his resources permit. A stag, however, may not always make a profit. A stag creates artificial demands for the securities in the market so as to cause a rise in their prices. If the response to an issue for which he has applied is poor and the same is not fully subs ribed, he may be allotted all the shares applied for and the shares would be available in the market at a discount. In such circumstances, he may have to sell his shares at a loss.

Bullish or Bearish Market: The tone of the market is said to be bu'lish at any particular time, when it is dominated by a feeling of optimism and the prices are showing a rising tendency. When reverse is the condition, i e., when it is pervaded by a feeling of pessimism and prices in the market are sagging, it is said to be bearish.

Contango: This is the amount charged by a stock-broker from a "bull" speculator for carrying over" his transaction to the next "settlement". A purchase of shares on the Stock Exchange may be either settled within the normal period of settlement or carried over beyond at the request of the purchaser, the latter is required to pay the difference between the original contract and the "making-up" price (which is roughly equivalent to the "middle price" ruling on the last day of the settlement) together with an amount, known as "contango" in consideration of the accommodation allowed to him is being permitted to carry over the transactions. The charge on account of contango depends upon the class of securities, their quantity and value, and interest rates prevailing at the time of the transactions in the money market.

Backwardation: Backwardation describes a carry-over of a bargain from the expiring account to the next, where, owing to the market position, a 'Bull', instead of paying a rate of contango receives one, and, a bear, instead of receiving a consideration for according accommodation has to give one.

Buying in and selling out : "Buying-in" is the process by which a buyer exercises his right of getting delivery of securities which he has purchased, when the seller fails to deliver them within the stipulated period. Conversely, 'selling out' is a process effected by a seller when the buyer fails to pay for and take delivery of the securities on the due date.

Making up price : 'Making up price' is the official price at which bargains for the account are carried over from one account to another. This price, generally corresponds to the closing price of a settlement and forms the basis for determining the difference (by comparing them with original rates) if bargains are carried over.

Cutting a loss : Closing one's position and paying a loss when the market is moving against one, is known as 'cutting a loss'.

Stop-loss order : It is an order given to a broker to close one's position as soon as the loss in the deal tends to go beyond a certain figure. A bull, for instance, may tell his broker to put him off if the price of the stock he had purchased moves lower than the purchase price by a given figure. Reverse will be the position in the case of a bear who may want his position to be closed when the price rises beyond a particular level.

Bear raid : A bear raid is a concerted attempt on the part of bears to unreasonably depress the price of a particular security by continuing to sell more and more despite the falling price.

Hammering : When bears, by persistent and continuous sale, pull down the price of a security, the process is described as 'hammering.'

The word is used in another sense also. When a member of an exchange fails to comply with his bargains, he is 'hammered', if he is declared a defaulter.

Rigging ; Rigging the market is the artificial raising or bolstering up of price levels. This usually happens as a result of concerned buying activity.

Corner : A corner signifies the condition prevailing in the securities market under which bulls have purchased such a preponderant proportion of the relative stock as renders it difficult for sellers to meet their commitments either by outright purchase or by borrowing them at heavy backwardation. The term is also used in describing a condition under which an outsider who may be an interested party has acquired such a large proportion of stock as to be in a position either to oust the management of the company or to at least seriously embarrass them

Margin : Margin in connection with the business on the Stock Exchange generally refers to the deposit which a constituent member is required to keep with the clearing house of the Stock Exchange as a sort of cover against any loss incurred by him in his speculative purchases and sales. If a member buys or sells shares (marked for margin) above the free-limit, he must deposit with the clearing house a certain amount per share. This margin system prevails in Delhi, Calcutta, Bombay and Ahmedabad Stock Exchanges.

Arbitrage : It is simultaneous purchase of securities in one market where the price thereof is low and sale thereof in another market, where the price thereof is comparatively higher This is done when the same securities are being quoted at different prices in the two markets, with a view to making a profit, the transactions are known as arbitrage operations. They are, in short, inter-market operations carried on with the avowed intention to derive advantage from difference in the prices of a security prevailing in the two markets.

Arbitrage dealings bring about all the benefits of a continuous market and bring the divergent prices prevailing in various markets to a level. They also make stock exchanges international in their scope and operations. Arbitrage dealings thus tend to equate prices subject to the cost of communication and transmission of funds from one place to another.

Margin-trading : It refers to the practice of dealing in shares and securities by depositing with the broker a certain percentage of the value of securities purchased or sold (described as margin) as security for meeting the loss, if any, that may arise on the contract. Speculators mostly trade on margins, i e., by depositing with the broker through whom they generally deal, an amount equal to the losses that are likely to occur on the contracts they have entered into. When the margin is deposited, the broker credits the amount to Margin Account of the customer. Depositing the margin generally is a condition of the contract being entered into and the stock or securities being held in the account of the client. If the margin falls short of the amount of loss suffered by the client on the stock or securities held on his account, the broker may sell them to cut short the loss if the client fails to deposit more amount. To illustrate, margin trading is carried on as follows :

Suppose a client opens an account with his broker with a deposit of Rs. 5,000. The amount will be credited to his Margin Account. Subsequently, the client requests the broker to buy 200 preference shares of Tata Oil Mills Ltd., @ Rs. 110. The broker shall purchase the shares and debit the client's account with Rs. 22,100, Rs. 22,000 being the cost of shares and Rs. 100 on account of brokerage. On the price of shares falling to Rs. 99, the client requests the broker to sell the same. After the shares have been sold, the amount of sale-proceeds less Rs. 100 on account of brokerage will be credited to the account of the customer. In the end, thus, there will be a debit balance of Rs. 2400, in the account of the customer which will be transferred to his Margin Account.

If, however, the client had not instructed the broker to sell the shares and the price had continued to fall, on the price touching Rs 857, the broker would have asked the client either to sell the shares or to deposit more margin, for at that price the loss suffered by the client would be equal to the amount deposited by him as margin.

Margin trading thus has three advantages ;

(i) It restrains excessive speculation because in the event of loss exceeding the margin, the broker would either sell or buy the shares to cover the outstanding contracts ;

(ii) It secures the broker against bad debts; and

(iii) It enables a person to engage in transaction much larger than his resources.

Cum-dividend : The term "cum-dividend" means "with dividend". It is commonly employed in relation to the price at which shares of companies are quoted on a Stock Exchange The price is said to be "cum-dividend," if the purchaser has the right to receive the dividend which has been declared, but not paid on the date of purchase". The amount of dividend (when shares are bought "cum-dividend") is part of the purchase p ice. Therefore, for adjusting their value in the books, the total amount paid is reduced by the amount of dividend receivable. The shares, normally are bought and sold "cum-dividend" because the registered holder only has the right to receive dividend even though a part of it may relate to the period before he had acquired them Such a right, however, can be surrendered either by a specific agreement or by the course of conduct. For example, when shares are purchased after the company has closed its Transfer Books, the purchaser would not be entitled to receive the dividend payable by the company. In such a case, it would be assumed that the buyer has surrendered the right in favour of the seller.

Ex-dividend : The term "ex-dividend" means "without dividend". If shares or securities are sold "ex-dividend", or "ex-interest," the purchaser is not entitled to receive any dividend declared or interest accrued up to the date of the sale, since they belong to the seller. Accordingly in such a case, the purchase price does not include any part of dividend or interest.

Lame Duck : A buyer who finds himself incapable of meeting his commitments on the due date is called a 'lame duck', This situation usually arises when the supply of shares is controlled by a few hands and either shares are not available in the market or the prices quoted for the shares in the market are so high that the bear cannot deliver the shares to those to whom he has sold them.

Short Selling : It is the process of selling securities which one does not possess, with the hope of a fall in price, when the sale shall be covered by making a purchase. Short-selling is a speculative and credit transaction. Theoretically, it is wrong to sell that which one does not possess and in practice, short-selling is bad because it leads to cornering. As short-seller gains through a fall in price, he helps in checking under-rise in prices. Short-selling also tries to bring about equilibrium and stability in the market. It not only pulls up the falling market but also checks an undue rise in security prices.

Bucket Shop : Brokere who deal in securities outside the Stock Exchange and many times carry out illegitimate business, are called 'Bucket shops'. They are unauthorised brokers and therefore connot enter the Stock Exchange premises. In many cases they try to make profit out of the losses of their clients.

Wash Sales : Fictitious sales, made at inflated prices on account of the false rumours, are called 'wash sales'.

Authorised Clerks : Under the regulations of every Stock Exchange, a member is authorised to appoint a certain number of authorised clerks to assist him in his

work. Their number varies from one Stock Exchange to another. The Bombay Stock Exchange, following the practice of the London Stock Exchange, permits appointment of five authorised clerk; the Madras Exchange of three clerks.

The clerks are not allowed to transact any business on the exchange in their own names, but can do so on behalf of their employers. If they hold a power of attorney they also can enter into an agreement on behalf of their employer. Besides salary, the authorised clerks are paid commission upto 50% of the brokerage earned on transactions put through by them. The authorised clerks are treated more favourably by the London Stock Exchange. A certain percentage of membership of the Exchange is reserved for their benefit and they are allowed a concession in rates of entrance and subscription fees. An authorised clerk with four years of service on the Exchange or in the Settling Room qualifies for the membership of the London Exchange In India, authorised clerks, however, are not given any such facilities.

APPENDIX I

Rule 19 of the Securities Contracts (Regulation' Rules, 1957, lays down the minimum requirements (which can be enlarged by Stock Exchange) with respect to the listing of securities on a recognised Stock Exchange. The more important of them are summarised hereunder :

A public company while applying for getting its shares 'listed' is required to forward to the Exchange, along with its application, amongst others, the following documents and particulars ;—

(a) Memorandum and Articles of Association, and in the case of a debenture issue a copy of the trust deed.

(b) Copies of all prospectuses or statements in lieu of prospectus issued by the company.

(c) Copies of balance sheets and audited accounts.

(d) A statement showing dividends and cash bonuses paid during the last 10 years and dividends or interests in arrears.

(e) Certified copies of agreements, etc., with vendors or promoters, underwriters and brokers, managing directors, technical directors and general manager, etc.

(f) A brief history of company since its incorporation giving details of its activities including any reconstruction, reorganisation or amalgamation, changes in its capital structure and debenture borrowings, if any.

(g) Particulars of shares and debentures issued for consideration other than cash, at a premium or discount or in pursuance of an option.

(h) Particulars of shares forfeited.

(i) A list of the highest ten holders of each class or kind of securities of the company as on the date of application along with particulars as to the number of shares or debentures held by and the addresses of each such holder.

(j) Particulars of shares or debentures for which permission to deal in is applied for, etc.

It is incumbent upon the applicant company to satisfy the Stock Exchange that :

(a) Its Articles of Association provide, *inter alia*, for the following—

(i) that the company shall use a common form of transfer,

(ii) that the fully paid shares will be free from all lien and that in the case of partly paid shares the company's lien, if any, will be restricted to money called or payable at a fixed time;

(iii) that any amount paid up in advance of calls on any shares may carry interest but shall not entitle the holders to participate in respect thereof, in a dividend subsequently declared ;

(iv) that there will be no forfeiture of unclaimed dividends before the claim becomes barred by law ; and

(v) that option or right to call shares must not be given to any person except with the sanction of the company in general meeting

(b) At least 49% of each class or kind of securities issued by the company were offered to the public for subscription by an advertisement in newspapers for a minimum period of three days and that applications received in pursuance of such offer were allotted fairly unconditionally.

Further, a company applying for listing shall, as a condition precedent, undertake, *inter alia*,

(a) (i) that letters of allotment will be issued simultaneously and so will be letters of right, and

(ii) that letters of allotment and renounceable letters of right will contain a provisio for splitting and that letters of allotment and letters of right will state how the next payment of interest or dividend on the securities will be calculated,

(b) to issue, when so required, receipts for all securities deposited with it, whether for registration, sub-division, exchange or for any other purpose;

(c) to issue certificates in respect of shares or debentures lodged for transfer within a period of one month of the date of lodging or transfer, and to issue balance certificates within the same period where the transfer is accompanied by a larger certificate;

(d) to advise the Stock Exchange of the date of the board meeting at which the declaration or recommendation of a dividend will be considered and advise the stock exchange of all dividends and/or cash business recommended or declared immediately after a meeting of the Board of the company has been held to finalise the same;

(e) to notify the Stock Exchange of any change in the company's directorate auditors, managing directors, etc.

(f) to forward to the Stock Exchange copies of statutory and annual reports and audited accounts as soon as issued, including directors' report;

(g) to notify the Stock Exchange prior to intimating the shareholders of any new issue of securities whether by way of right previleges, bonus or otherwise and the manner in which it is proposed to offer or allot the same;

(h) to notify the Stock Exchange of any other alteration of capital including call;

(i) to grant to the shareholders the right of renunciation in all cases of issue of rights, privileges and benefits and to allow them a reasonable time to record, exercise or renounce such rights, privileges and benefits;

(j) to give notice to the Stock Exchange well in advance of the dates of closures of its transfer books or when the transfer books are not to be closed, the date fixed for taking a record of its shareholders or debenture-holders along with the purpose for which the transfer books are to be closed or the record taken ;

(k) to forward to the Stock Exchange an annual return immediately after each annual general meeting or at least ten principal holders of each class of security with their addresses along with the number of shares or debentures held by each;

(l) to promptly notify the Stock Exchange of any action which will result in the redemption, cancellation on retirement of any listed securities, and of the intention to make a drawing of such securities giving the date of the drawing and the period of the closing of the transfer books and of the amounts of securities outstanding after any drawing has been made;

(m) to notify the Stock Exchange of any material change in the general character or nature of the company's business; and

(n) to intimate the Stock Exchange of any other information that may be necessary to enable the shareholders to appraise the position of the company and to avoid the establishment of a false market for the shares of the company.

FINANCIAL INSTITUTIONS

Industry normally requires short-term, medium-term and long-term finances. Besides commercial banks, there are other specialised institutions that provide financial assistance to industry.

When appraising a term-loan proposal, the basic question that is to be determined is whether enough cash can be expected to be generated during the currency of the term-loans from the project for repaying the principal instalments and the interest on the term-loans.

In recent years, the institutional set-up in India for the provision of medium and long-term credit for industry has been broadened. A number of specialised institutions has been set up all over the country. For the composition, aims and functions of the financial institutions, students should refer to F.S P. (N) Fin. Man. 3.

Application for borrowing loans : How loan applications are appraised and evaluated has already been discussed in F.S.P. (N) Fin. Man. 3 to which a reference may be made. There are prescribed forms which are available forms the said institutions. The information to be furnished by borrowers in such an application varies in different circumstances. However, the following items are usually covered.

1. Capital structure of the Company : Under this head, full data regarding authorised, subscribed and paid-up capital is required. A complete copy of the consent order of the Controller of Capital Issues for any issue of fresh capital proposed in excess of Rs. 50 lakhs has to be furnished along with the application. In case, there is a proposal in the said application for getting the share capital subscribed or underwritten, then the subscribers' or underwriters' names together with the number of equity and preference shares subscribed or underwritten must be mentioned.

2 Names and addresses of Bankers.

3. A statement of the purpose for which the loan is proposed to be utilized.

4 Time schedule for implementation of the scheme with such particulars as acquisition of land, site preparation and development, construction of buildings and foundations, placing orders for imported equipment, arrival at site of imported equipment, placing order for local equipment, arrival at site of local equipment, completion of erection, start-up of production, reaching normal production, reaching full production. Against each such particular, the approximate month and year of completion have to be stated. A chart indicating critical path for expeditious construction, if available, would be helpful.

5. Name of the foreign collaborators, if any. If there are collaborators, then the copies of the collaboration agreement and Government's approval thereto are to be furnished.

6. Estimated cost of the scheme under each of such items as land, buildings, plant & machinery, technical know-how and engineering charges, miscellaneous fixed assets, interest and expenses during construction to be capitalised, pre-opertive expenses, machinery stores and spare parts, preliminary and capital issue expenses, provision for contingencies, start-up expenses, and *margin money* for working capital.

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Contents :

Provisions of MRTP Act, 1969, rules and procedures thereunder—Foreign Exchange Regulations—Industries (Development and Regulation) Act.

Prescribed Readings : Sengupta On the Monopolies and Restrictive Trade Practices Act (1980 Edition) and Applications to the Central Govt. under the Companies Act, Capital Issues (Control) Act, MRTP Act, Industries (Development and Regulation) Act—Vol. II by Shanbhogue and Das Gupta.

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PROVISIONS OF MRTP ACT AND ITS EVALUATION

One of the most confusing and controversial pieces of legislation to regulate private economic power in the field of industry, trade and commerce is the Monopolies and Restrictive Trade Practices Act, 1969 (popularly known as MRTP Act). The Act was the culmination of a growing concern over the evils of concentration of economic power first expressed in our Constitution and later articulated in economic, political and public circles. The Directive Principles of State Policy enshrined in our Constitution call upon the State to secure 'that the ownership and control of material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. To give effect to the above Directive Principles and following the study and recommendations of the Monopoly Enquiry Commission set up by the Central Government, Parliament passed the Act in 1969.

Before going into the several relevant provisions of the Act, it would be useful to highlight certain important features of it, as follows :

1. The Act is a compact piece of legislation with 67 sections grouped in nine chapters.

2. The most important chapters are III, IV and VI. Chapter III deals with concentration of economic power in the hands of large industrial undertakings and dominant undertakings. Chapter IV deals with curbing and discouraging monopolistic trade practices, practices which have the effect of maintaining price at unreasonable level or unreasonably preventing competition or limiting technical development or capital investment or allowing the quality of goods or services to deteriorate. Chapter VI is concerned with trade practices which affect the uninterrupted flow of resources into production, or the manipulation of price mechaism as to place consumers at a disadvantageous position.

3. The Act does not strike at concentration of economic power as such but is aimed at curbing and regulating it when it is detrimental to the public interest.

4. While concentration of economic power is no crime, certain monopolistic and restrictive trade practices are treated as offences and are outlawed.

5. The Act does not apply to Government undertakings. The presumption is that public undertakings and their functions do not involve any detri-

ment to the public interest as envisaged is the Act. Nor does the Act apply to employees' or workers' unions (monopoly labour).

6. The expression 'concentration of economic power' is not defined in the Act. Concentration has to be inferred having regard to the circumstances surrounding each case.

7. A Monopolies and Restrictive Trade Practices Commission has been set up under Section 5 of the Act to administer the provisions of the Act.

8. The Act provides for the appoinment of the officials, the Director of Investigation and the Registrar of Restrictive Trade Practices. The former assists the Commission by carrying out preliminary investigations into the complaints of restrictive practices. The Registrar will mainly concern himself with the registration of restrictive trade agreements and to file cases with the Commission on any restrictive trade practice.

9. The Commission has only advisory role in regard to cases of concentration of economic power. On reference of any case by the Central Government, the Commission will study the same and submit its opinion to the Central Government, which is empowered to make the final decision. The Commission has no jurisdiction to take up any case on its own initiative.

10. In regard to monopolistic trade practices, the Commission may take initiative on its own or on reference of cases by the Central Government or any private party and submit its findings to the Central Gevernment which is obliged to pass orders on the basis of the findings.

11. But in regard to restrictive trade practices, the commission itself is competent to hold investigations and pass orders directly.

The provisions that deal with constitution, powers, terms and conditions of service, removal from office, etc., of the MRTP Commission are discussed below :

1. *Establishment and Constitution* : Section 5 empowers the Central Government to constitute the Commission which shall consist of a Chairman and at least 2 members but not exceeding 8, all appointed by the Central Governwent. The Chairman must be one who is or has been a Judge of the Supreme Court or a High Court or is qualified to be so As regards the members of the Commission, they should be persons of ability, integrity and standing and they should have knowledge and experience or capacity in grappling with problems relating to economics, law, commerce, accounting, industry, public affairs or administration. In the

matter of appointing a member, the Central Government has to be satisfied that the person concerned does not or will not have any financial or other interests by reason of which his functions, as such members, is likely to be affected prejudicially. He shall not be a person whose interests will jeopardise his independence or come in conflict with his duties.

2. *Terms and Conditions of Service*: According to Section 6 of the Act, the maximum tenure of a member can be 5 years. But he is eligible for re-appointment. However a member cannot be allowed to hold such office for more than 10 years. He shall retire when he completes 10 years or attains the age of 65 years, whichever is earlier. A member has the right to resign his office. He can be removed as well in terms of Section 7 (which we shall discuss later). The casual vacancy following in the wake of his resignation or removal shall be filled by fresh appointment. The acts of the Commission cannot be called into question only by reason of any such vacancy or any defect in its constitution.

The Government has the power to fix the remuneration of members. But once the remuneration has been fixed and the appointment made of a member, his remuneration cannot be varied by it to his prejudice.

Where there is a divergence of opinion among the members, the majority opinion shall prevail. Accordingly, the decision should be recorded as majority view.

The Chairman and the members are required to take the oath of office as well as of secrecy.

On ceasing to hold office, a member shall be debarred from holding any appointment or connection with any industry or undertaking to which the Act applies. This debarment shall hold good for a period of 5 years. The contravention of this provision has not been made a penal offence under this Act; but there does not seem to be a bar to obtaining an injunction from a Civil Court to enforce this particular provision.

(3) *Removal*: In terms of Section 7 of the Act, a member can be removed from his office by the Central Government: (*a*) on his being adjudged an insolvent; (*b*) on his being convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; (*c*) on his becoming mentally or physically incapable of acting as such member; (*d*) on his acquisition of such financial or other interest which would affect prejudicially his functions as a member; (*e*) on his abusing his position to such an extent as to render his continuance in office prejudicial to the public interest.

The Central Government can exercise its power of removal of a member from his office on the grounds mentioned in (*a*), (*b*) and (*c*) above, at its own discretion. But the Central Government can exercise its power in this behalf on the other two grounds, referred to in (*d*) and (*e*) above, only in accordance with the prescribed procedure. The procedure is that the Central Government, for this purpose, should refer the matter to the Supreme Court. Thereupon, the Supreme Court is to make a relevant enquiry. If, on such enquiry, it reports to the Central Government that the member should be removed on the grounds alleged against him, then only the latter can remove him.

(4) *Appointment of director and staff*: By dint of Section 8, the Central Government can, in consultation with the Commission, appoint a director of investigations. As the designation implies, such appointment is intended to make investigations for the purposes of the MRTP Act. Also, the Central Government may make provision, in the like manner, in regard to the number of members of the staff together with their conditions of service ; once the appointment is made, such conditions are not to be varied to the prejudice of the appointee subsequently.

In terms of Section 9, the expenses, including salaries, allowances, pensions, have to be defrayed out of Consolidated Fund of India.

JURISDICTION, POWERS AND PROCEDURE

(1) *Inquiry into monopolistic or restrictive trade practices*: By virtue of Section 10, the Commission can make inquiry in this regard in the following cases, namely—(*i*) when a complaint regarding such practice is lodged by a traders' or consumers' association having a membership of not less than 25 persons or by 25 or more consumers ; (*ii*) when the Central Government or a State Government makes a reference to the Commission for inquiry, (*iii*) when the Registrar makes an application to the Commission, (*iv*) on its own knowledge or information.

Inquiry by the Commission into any monopolistic trade practice can be made, either on a reference being made to it by the Central Government or upon its own knowledge or information. On the receipt of a complaint for inquiry into any restrictive trade practice, the Commission cannot forthwith issue any process against the person concerned ; before that, it must cause a preliminary investigation to be made by the director of investigation so as to satisfy itself whether the complaint really calls for an enquiry (Section 11).

In re Western India Match Co. Ltd. (*1976*) *46 Comp. Cas. 22,* on the basis of its (Commission's) power to direct an inquiry on its own knowledge and information, the Commission gave notice to the company alleging that the latter was making variable charges for hondling and storage from State to State and also from time to time without there being any apparent difference in the actual charges, only

with a view to prevent, distort or restrict competition. Thereupon, the company replied that the allegations being vague, the order of the Commission was void. But the Commission held that the allegation was not vague but was precise; whether or not the allegations were true would become explicit from the company's books of account.

A question may arise as to whether the Commission can enquire into a matter even on the basis of a defective complaint, *e g.*, receipt of complaints only from 23 members instead of 25 or more, receipt of information form an invalid or irregular complaint or even from an anonymous letter, etc. In all these cases, the High Court of Allahabad (*vide J.K. Synthetics Ltd. v. R.D. Saxena, Director of Investigation* (*1977*) *47 Comp. Case. 325*) upheld the ruling of the Calcutta High Court (*in I.T.C. v. M.R.T.P. Commission* (*1976*) *46 Comp. Cas. 619*) to the effect that in the circumstances cited above, the Commission was competent to exercise its jurisdiction under Section 10(a)(iv). It may be noted that an invalid ccmplaint can be treated as a source of information which can be used to commence a *suo motu* inquiry.

The Allbhabad High Court, in the case cited in the preceding paragraph, also laid down that a past practice cannot be inquired into. Therefore, the practice under inquiry must exist *in presenti*. It seems that the intention of the Act is to curb only those practices which are in existence at the time of the passage of order by the Commission. Presumably, the Legislature appreciated the futility of flogging a dead horse. But this is subject to a reservation, which was pointed out by the Commission in an earlier case (*viz., Registrar v. Baroda Rayon Corporation Ltd.* (*1975*) *45 Comp. Cas. 660, MRTPC*), than an agreement might expire but the practice started by the agreement might continue. It is incumbent upon the Commission to find out this fact; consequently its jurisdiction cannot be set at rest by merely terminating the agreement or by showing that, as a result of the efflux of time, the agreement has expired. If the Commission is convinced of the existence of a prejudicial practice, it may order discontinuance of such practice; even if the Commission finds that the practice has already been put an end to, it may nonetheless order that the practice shall not be repeated.

(2) *Powers of the Commission*: Section 12 of the Act provides that the Commission, for the purposes of its inquiry and in regard to the matters discussed hereunder, has been bestowed with the same powers as those of a Civil Court under the Code of Civil Procedure. The aforesaid matters are: (*i*) summoning and enforcing of attendance of any person and examining him on oath; (*ii*) discovery and production of any document or other material object producible as evidence; (*iii*) acceptance of evidence on affidavits; (*iv*) requisition of any public record from any Court or office; (*v*) issuance of any commission for examining witnesses.

The proceedings before the Commission are treated as judicial proceedings for the purposes of Sections 193 and 228 of the Indian Penal Code. The Commission itself shall be deemed to be a Civil Court for the purposes of Section 195 of the Code of Criminal Procedure.

If the Commission, for inquiring into a restrictive trade practice, has to examine any books or documents, it can call for them from the custodian thereof. Such custodian can also be called upon to furnish the Commission with any such information regarding the restrictive trade practice under inquiry as may be in his possession, relating to the trade carried on by any other person.

The Commission has the power to make its orders conditional or subject to such provisions as may be necessary. But such orders must not be inconsistent with the purposes of the Act. The reason behind the vestiture of this power is to assure the proper execution of the Commission's orders. Where any person fails to comply with such orders, or commits a breach of provisions of an order, it will be deemed to be an offence under the Act. The Commission can amend or revoke its orders in the same manner in which they were made. As regards the Commission's orders, it may be general or limited to particular class of traders or to a particular class of trade practice or a particular trade practice or a particular locality (Section 13).

Suppose, a particular practice falls within monopolistic or restrictive trade practice in relation to production, supply or distribution of goods or services, but the party to such practice does not carry on business in India. In such a situation, the Commission can make an order in respect of that part of the practice which is being carried on in India (Section 14).

(3) *Restriction of application of Orders* : Under Section 15 of the Act, the Commission's orders pertaining to any monopolistic or restrictive trade practices cannot restrict any of the following rights, *viz.*, (*a*) one's right to restrain the infringement of a patent granted in India ; (*b*) one's right as to the condition which one attaches to a licence to do anything which, without such licence, would have been an infringement of a patent granted in India ; (*c*) one's right to export goods from India, to the extent to which the monopolistic or restrictive trade practice relates exclusively to the production, supply, distribution or control of goods for such export.

Sittings, Hearing and Procedure : Though the Commission has its central office at Delhi, it can nevertheless hold its sittings at any place or time which is convenient to it for discharging its functions (Section 16). The Chairman of the Commission can form Benches from among the members, and a Bench, thus formed, can exercise the powers and functions of the Commission.

Unless the confidential nature of the offence under inquiry necessitates the maintenance of secrecy, the hearing at proceedings before the Commission shall be in *public*. But if secrecy is required to be maintained, then the Commission may (*a*) order for the proceeding to be held in camera, (*b*) tender necessary directions to the persons present there, and (*c*) prohibit or restrict the publication of evidence led in (whether in public or in private) or of matters contained in documents filed before the Commission (Section 17).

The Commission is empowered, subject to the provision of the Act, to regulate (*i*) the procedure and codduct of its business, (*ii*) the procedure of its Benches, and (*iii*) the delegation to one or more members of such powers and functions as the Commission may specify. It has also the power to determine the extent to which the persons interested in the subject-matter of any proceedings are permitted to be heard either in person or through representatives or to cross-examine witnesses or otherwise to participate in the proceedings (Section 18).

Under Section 19, the Commission must send an authenticated copy of every order made by it in respect of a restrictive trade practice to the Registrar whereupon the letter shall record the same in his register in the prescribed manner.

In re Anil Starch Products Ltd. (*1975*) *45 Comp. Cas. 600 M.R.T.P.C.* the Commission explained its own nature and the purpose of the Act thus :

"The Act was passed to give effect to the directive principles of the Constitution enshrined in Articles 38, 39 so that the social and economic justice may be done and to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

"The proceedings before the Commission are quasi judicial proceedings. There is no doubt that every citizen of India is concerned to prevent concentration to common detriment and is entitled to appear before the Commission and furnish information. But this right is subject to the limitations imposed by Sections 17 and 18 and regulations made thereunder. The proceedings before the Commission are not adversary proceedings or *inter parties*. Those who appear are members of the public to give assistance to the Commision to discharge its duty of controlling monopolies and preventing concentration."

Concentration of Economic Power

Chapter III of the MRTP Act (containing Sections 20 to 30) deals directly with concentration of economic power in private hands. Section 26 enjoins upon all large and dominant undertakings as defined n the chapter to register themselves with the Central Government within a period of 60 days from the commencement of the Act (1st June, 1970). The onus for registration rests with the undertakings themselves. However, the Central Government may prosecute any undertaking which in its opinion is liable for registration but fails to do so. Once an under-

taking is registered under the Act, it comes under the purview of the Act for all purposes of control of monopoly and economic power.

The provisions of this chapter apply to certain classes of undertakings, as follows (Section 20) :

1. (*a*) An undertaking whose assets are of the total value of not less than Rs. 20 crores.

   (*b*) An undertaking whose assets together with the assets of inter-connected undertakings, are of the total value of not less than Rs. 20 crores.

2. (*a*) A 'dominant undertaking' whose total assets are of the value of not less than Rs. 1 crore, and

   (*b*) A dominant undertaking whose total assets together with the assets of interconnected undertakings are of the value of not less than Rs. 1 crore.

It is necessary to be clear about the definitions of some of the above terms :

Undertaking means a business organisation which is engaged in the production, supply, distribution of control of goods of any description or provision of service of any kind.

According to Section 2 (*d*) of the MRTP Act, a dominant undertaking means an undertaking which by itself or along with inter-connected undertakings—(*i*) produces, supplies, distributes or controls 1/3rd or more of the total supply of goods of any description in the country, or (*ii*) provides or controls 1/3rd or more of any services rendered in India. But the goods produced by an undertaking shall not be taken into account : (1) if the undertaking employs *50 to less* workers on any day of the relevant year, and in any part of which a manufacturing process is being carried on *with the aid of power* or is ordinarily so carried on : or (2) if it employs *100 or less workers* and the aforesaid manufacturing process is being carried on *without the aid of power*.

If the quantum of the thing mentioned under (*i*) or (*ii*) above is shared by inter-connected undertakings, then each such undertaking is deemed to be a dominant undertaking.

Where any goods of any description are the subject of *different forms* of production, supply, distribution or control, every reference in this Act to such goods shall be construed as reference to any of those forms, whether taken separately or together or in such groups as may be prescribed.

If an undertaking by itself or along with inter-connected undertaking does the things mentioned in Section 2 (*d*) (*i*) or (*ii*) above according to any of the criteria, *viz.*, value, cost, price, quantity or capacity, of the gooods or services or the

number of workers employed for the production, supply distribution or control of such goods or for the rendering of such services, then such an undertaking will be deemed to be a dominant undertaking.

In determining the question as to whether or not an undertaking is a dominant undertaking, regard shall be had to: (*a*) the lowest production (including supply, distribution or control of goods) made or services rendered by the undertaking concerned during the relevant year; and (*b*) the the figures published by the Central Government relating to the total production made or services rendered in India or any substantial part thereof during the relevant year.

Inter-connected undertakings means two or more business organizations which are related to each other by virtue of effective common ownership or effective common management control directly or indirectly. A company which is a subsidiary of another company is an inter-connected company. In India, certain business houses or groups exercise substantially direct or indirect ownership and management control of an effective nature over a number of business units. There may be common directors or common managing directors. There may be *de jure* control through majority shareholding or *de facto* control through minority shareholding.

Two or more companies are deemed to be under the same management (*i.e.* common management) in the following cases, namely-(*a*) where one company exercises control over the other or where both are under the control of the same group or a constituent of the same group; (*b*) where the managing director or manager of one company is also occupying the same position in the other company; (*c*) where one company holds 1/3rd of the equity shares in the other or controls 1/3rd of the total membership of the Board of Directors of the other; (*d*) where one or more directors of one company constitute, or at any time within the preceding 6 months (these 6 months are to be calculated from the date on which the question arises whether the two companies are under the management), constituted 1/3rd of the directors of the other, whether independently or together with the relatives of such directors; (*e*) where 1/3rd of the equity shares in one company are held by an individual belonging to a group whether by themselves or together with their relatives also hold 1/3rd of the equity shares in the other company; (*f*) where a company or companies belonging to a group hold 1/3rd equity shares in other companies; (*g*) where 1/3rd of the total voting power with respect to any matter relating to each of the two companies is exercised or controlled by the same individual, whether independently or together with his relatives or by the same company whether independently or together with its subsidiaries; (*h*) where 1/3rd of the total voting power with respect to any matter pertaining to each of the two companies is exercised by individuals or companies belonging to a group or jointly by such individuals and companies; (*i*) where the directors of one company are accustomed to act in accordance with the directons or instructions of one or more of the directors of the other or where the directors of both the companies are accusto-

med to act in accordance with directions, etc.. of an individual whether belonging to a group or not [Explanation I to Section 2 (*g*)].

Where a group exercises control over a company, such company and every other company which is a constituent of, and controlled by, the group shall be deemed to be under the same management [Explanation II to Section 2 (*g*)].

Where two or more companies under the same group hold in the aggregate 1/3rd equity share capital in any other company, such other company shall also be deemed to be under the same management as the first-mentioned companies [Explanation III to Section 2 (*g*)].

In determining whether or not two more bodies corporate are under the same management, the shares held by the public financial institutions in such bodies corpotate shall not be taken into account. For example, undertaking B is inter-connected with undertaking A and undertaking C is inter-connected with undertaking B. Undertaking C is inter-connected with Undertaking A ; if undertaking D is inter-connected with undertaking C, undertaking D will be inter-connected with undertaking B and consequently with undertaking A and so on.

Two or more undertakings shall be deemed to be inter-connected, if : (*a*) one or more undertakings which are inter-connected, jointly or severally, own, manage or control the other ; (*b*) one or more individuals together with their relatives or firms in which they are partners, jointly or severally, own, manage or control the other ; (*c*) inter-connected undertakings mentioned in (*a*) and persons, relatives or firms mentioned in (*b*) jointly or severally, own, manage or control the other [Explanation IV to Section 2 (*g*)].

The definition of inter-connected undertaking given in the Act is a very complicated one and is only to be inferred on the basis of facts, circumstances or some valid presumptions. The abolition of managing agency system in 1970 has resulted in a formal delinking of otherwise inter-connected undertakings. However, there is the phenomenon of a central decision-making authority for many apparently independent undertakings. This authority has tremendous hold on the fortunes of its empire consisting of diverse units operating in different businesses from steel to soaps. Trusted men may be appointed to manage the affairs of individual units, in accordance with the wishes of the parent group. Each case needs to be carefully examined along several dimensions to determine the direct or indirect inter-connection among ostensibly independent business organisations.

Assets mean the value of assets as shown in the books of account of the undertaking in question after making provision for depreciation or for renewals or diminution in value by wear and tear or otherwise. Liabilities are not to be taken into account while determining the value of assets.

Concentsation of economic power is sought to be curbed and cantrolled through assumption of authority for approval by the Central Government in regard to certain activities of the large and dominant undertakings covered by chapter III.

These activities are : expansion of existing activities, establishment of new undertaking of an inter-connected nature, mergers or amalgamations and takeovers, and appointments involving inter-locking directorships. Even an existing undertaking may be directed by the Central Government to split itself into independent units if its activities are found to be prejudicial to public interest. We shall examine below each of the above regulatory measures in some detail.

(*a*) *Regulation of substantial expansion* (*Section 21*) ; The provisions in respect of concentration of economic power apply to business houses whose assets, along with those of their inter-connected undertnkings come up to Rs. 20 crores and also to every dominant undertaking whose assets either in themselves or along with those of its inter-connected undertakings are not less than Rs. 1 crore.

The purpose of the Section is to prevent or at least to regulate concentration of economic power by regulating substantial expansion by the undertaking to which Part A of Chapter III applies. In the case of a company or companies having assets not less than Rs. 20 crores, substantial expansion would mean expansion which would result in an increase of not less than 25% of value of its assets before expansion. If the production, supply or distribution of any goods or provision of any services increase by not less than 25% of such production etc., before the expansion, such expansion would also be considered as substantial expansion. In the case of dominating undertaking or undertakings having not less than *rupees one crore* worth of assets, substantial expansion would mean expansion resulting in increase of 25% or more of production, supply, distribution or control of any goods or services over such production etc., of such goods or services before the expansion.

Undertakings covered by these provisions must give notice to the Central Government in prescribed from if it intends to substantially expand its activities by the issue of fresh capital or by installation of new machinery or other equipment or in any other manner. They must also disclose the scheme of finance for the proposed expansion and connections if any with other undertakings. Any other information prescribed by the Government has also to be furnished,

Unless such proposal is approved by the Central Government, no undertaking can carry on its programme of substantial expansion as explained above.

The Central Government may call for any information as may be required to satisfy itself that :

(*a*) the expansion is not likely to lead to the concentration of economic power,

(*b*) it is not likely to be prejudicial to public interest, and

(*c*) it is expedient in the public interest to permit the expansion.

If the Central Government is satisfied, it may approve the proposal of substantial expansion by any undertaking by [this Part. If, however, the Central

Government feels that the matter should be further enquired into, it may refer the application to MRTP Commission for enquiry. The Commission would send a report to the Central Government after having such hearings as it thinks necessary. Thereupon, the Central Government may pass orders on the proposed expansion as it may think proper. After the Central Government's approval, the proposed scheme of expansion and scheme of finance for such expansion cannot be modified without prior approval of the Central Govt.

It may be mentioned that 'substantial expansion' does not require prior approval of the Central Government if

1. the expansion is not by a dominant undertaking,
2. it is in the same or similar line, and
3. it is covered by Section 13 of the Industries (Development and Regulation) Act.

(*b*) *Control over establishment of new undertakings* (*Section 22*) : Any large undertaking (not being a dominant undertaking) whose assets alone or together with its inter-connected undertakings are of the value of Rs. 20 crores or more, (or the secretary on its benalf) has to apply to the Central Government for permission if it wants to establish a new undertaking of an inter-connected nature.

This section does not apply to dominant undertakings. Nor does it apply to any new undertaking of any size which is an independent one and is not inter-connected with any existing large undertakings. Both the above types of undertakings can go ahead without the approval of the Central Government under the Act ; but they may be subject to other Acts.

For purposes of this section, a new undertaking implies production, distribution, supply or control of a new product or service, which is different from those already on the existing undertaking's product or service line. The new undertaking may also be a new venture in the above sense without entailing the creation of a separate company. It can be of any size.

The Central Government wil accord approval to such plan if it is satisfied that it will be in public interest or will not lead to concentration. It may impose the same type of conditions on the undertakings as mentioned in Section 20.

In both the above cases of expansion and establishment of new undertaking, the Central Government may insist on the undertakings to present the scheme of finance for its perusal.

It may further be noted that the expansion of existing product line (covered by Section 21) may be carried out at the same location where the business of the applicant undertaking is situate or at a different location or locations. Same is the case with the establishment of a new undertaking. In both the above cases, it is

immaterial whether or not a distinct legal entity is proposed to be created, for purposes of the Act.

Contravention of Section 22 is punishable with fine which may extend up to Rs. 1 lakh and in the case of the offence being a continuing one, with a further fine extending up to Rs. 1,000 for every day for which the default continues.

(c) *Control over merger, amalgamation and takeover (Section 23)* :

Under the provisions of this section, proposals for mergers, amalgamations or take-overs by or of undertakings covered by Chapter III, shall have to be approved by the Central Government only and not by any other agency or Court of law. The application for the approval has to be made in the prescribed form, along with a copy of the scheme. The Section covers mergers/amalgamations on the one hand and take-overs on the other. A merger/amalgamation is an arrangement whereby the assets of two or more companies become vested in one company (whether in one of the existing companies or in a new company) which has its shareholders, all, or substantially all the shareholders of the said merging companies. In a take-over which is also termed as acquisition, one company seeks to purchase the controlling block of shares or the assets of another company with a view to acquiring control over the latter.

The Section specifies that when an undertaking covered by Chapter III proposes a scheme of merger or amalgamation with another undertaking, or alternatively when two or more undertakings propose to enter into a merger or amalgamation as a result of which a new undertaking will come into existence to which this Chapter shall apply, it must get prior approval from the Central Government. The approval of the Central Government under the Act is not necessary in case, however, the merging companies are already inter-connected, already produce the same goods or services and are not dominant undertakings. For this type of companies, there are enough control tools in the hands of the Central Government through the Companies Act.

Another provision in Section 23 requires that if an undertaking covered by Chapter III proposes to take over or acquire by purchase or otherwise the whole or part of another undertaking, it has to obtain prior approval of the Central Government. An application shall have to be made in writing to the Central Government in the prescribed form, which has to state the information about the inter-connection with other undertakings and about the scheme for the proposed acquisition and such other information as may be prescribed. Once the scheme (proposal) has been approved by the Central Government, it shall not be modified except with the approval of the Central Government. If the Central Government thinks that some inquiry about the scheme is required, it may refer the matter to the Commission, whereupon, the Commission shall report its opinion to the Central Government. After receiving, its opinion, the Central Government may pass such orders as it may think fit.

However, if a non-dominant undertaking registered under Chapter III proposes to acquire another undertaking not coming under the purview of the chapter, both producing the same goods or services, no approval of the Central Government is necessary.

If a merger/amalgamation or take-over is effected by the undertaking covered under Chapter III without the approval of the Central Government, the latter may issue orders to the said undertakings to restore *status quo ante* (Section 24). Precisely, in such circumstances, default is punishable under Section 46 of the Act itself with a fine extending up to Rs. 1 lakh and Rs. 1000 for every day that the default continues. But additionolly, the Central Government may, in consultation with the Commission, order the undertaking to put an end to the contravention and to divest itself of the stock or share capital or assets which it has acquired. The Central Government may also require the undertaking to carry out such other directions as the former may, in the circumstances, issue.

The Supreme Court explained in *Carew & Co. v. Union of India* [*(1975) 25 SCC 791 : (1976) 46 Comp. Cas. 121*], the significance of the term "undertaking" and circumstances in which Section 23 would be attracted. In this case, Carew & Co. proposed to start a new company by the name of Shahjahanpur Sugar (P) Ltd. which was to take over the sugar factory of the former, as the factory was encountering difficulties for some years because of inadequancy of sugar cane supply. The new company was to have a capital of Rs. 50 lakhs and work the sugar factory as its own undertaking. Carew & Co. was to get an allotment of 100% shares in the new company and also charge more than Rs. 15½ lakhs as consideration for the transfer of its sugar unit to the new company. The first-mentioned company sought approval of the Central Government under Section 372 of the Companies Act for investing Rs. 50 lakhs in another company and also under Section 23(4) of the M.R.T.P. Act for acquiring or purchasing a new undertaking. The application having been rejected under both the Acts, the Company appealed to the Supreme Court under Section 55 of the M R.T.P. Act. The Supreme Court held that the Central Government's approval was not needed under Section 23(4) of the M.R.T.P. Act, since what the company proposed to do was not the acquisition of an undertaking. There was no "undertaking" yet to be acquired Emphasis was laid on the fact that there can be an undertaking within the meaning of Section 2(v) only when it is already engaged in the production, supply, distribution or control of goods or services ; but in the instant case there was only a proposal to establish a new undertaking. The word 'undertaking' is a coat of many colours as it has been used in different sections of the Act to convey different ideals. In some of the Sections, the word has been used to denote the enterprise itself while in many other Sections it has been used to denote the person who owns it. The definition of the word : 'undertaking' in Section 2(v) would indicate that 'undertaking' means the enterprise which is engaged in production, sale or control of goods, etc. "We think the question to be asked and answered is : Did the appellant make a proposal to acquire any undertaking of Shahjahanpur Sugar (P) Ltd., by purchase, take-over or otherwise ? To answer this

question, it is necessary to see whether the sugar unit which was proposed to be transferred had been engaged in production, etc., as an enterprise of Shahjahanpur Sugar (P) Ltd. It is clear that on the date of the proposal, the sugar unit of the appellant had not become an undertaking of Shahjahanpur Sugar (P) Ltd. as it had not been engaged in the production of goods etc."

(*d*) *Regulation of inter-locking directionships* (*Section 25*) :

Inter-locking directionships is a common phenomenon in India and is a powerful means of perpetuating and proliferating concentration of economic power in a few big business houses. Under the Section, prior approval of the Central Government is necessary if a director of a large or dominant undertaking (covered under Chapter III) is to be appointed as director of another undertaking. Any appointment contrary to the provisions of this Act shall be void. Prior approval is necessary only if the director is already connected with 10 undertakings as director and is sought to be appointed as director in more undertakings. This means that MRTP Act allows a person to hold directiorships in 10 inter-connected undertakings. If an appointment has been made in violation of the Act, the acts of such a director shall nonetheless be valid, but only as long as it is not shown to the company and to the director that the appointment is void.

These provisioos also apply to the partners of a firm which is an "undertaking" within the meaning of the Act. Any transgression, without a reasonable excuse, is punishable under Section 47 with a fine which may extend to Rs. 2,000 and Rs. 200 for every day during which the default continues.

Registraion of Undertakings : Section 26 makes it obligatory for the undertakings (to which the provisions relating to prevention of concentration of economic power apply) to register themselves with the Central Government. The application for registration must be made within 60 days from the time at which the provisions become applicable. However, on sufficient cause being shown for the default, the Central Government can extend such time. The application has to be made on a prescribed form. The Govt. shall maintain a register of such undertakings. The name of the applicant is entered in the register and a certificate to that effect is issued.

If, subsequent to the above-mentioned registration, the undertaking ceases to be one to which this part of the Act applies, then the undertaking may apply to the Central Government for cancellation of the registeration. Thereupon, the Government may, after making such enquiry as it may think fit, cancel the registration and notify such cancellation in the Official Gazette.

Division of Undertaking (*Part B* : *Section 27*) :

Part B of Chapter III of MRTP Act permits Central Government to divide existing undertakings or inter-connections. This is a very drastic provision and is restored to only in exceptional cases, where public interest is vitally involved. Under the provision of this Section, if the Central Government feels that the

working of any undertaking covered under Chapter III is prejudicial to public interest or is leading or is likely to lead to the adoption of monopolistic or restrictive trade practice, it may prepare a *prima facie* case for division of the business of the undertaking or its inter-connected undertakings and forward it to the MRTP Commission to investigate further and submit its recommendations. It is the prerogative of the Central Government to make the final decision on the matter after receiving the recommendations of the Commission.

The Commission may also advise the Central Government as to what should be the manner of division and what compensation (if any) should be payable for such division.

The Section contemplates only division of the business of the MRTP undertakings or division of inter-connections. Total severence or break-up of inter-connection is ruled out. For purposes of this Section, all activities carried on by way of trade by an undertaking or two or more inter-connected undertakings may be treated as a single trade. Reference to the Commission for purposes of investigation is obligatory on the part of the Central Government. But the final decision rests with the Central Government. The Commission may direct the division of any such trade. An order for the division of a trade may provide for all such matters as may be necessary to give effect to the division of any trade of the undertaking or of the undertakings or inter-connected undertakings including the following : (*a*) the transfer or vesting of property, rights, liabilities or obligations ; (*b*) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise ; (*c*) the creation, allotment, surrender or concellation of any shares, stock or securities ; (*d*) the payment of compensation ; (*e*) the formation or winding up of an undertaking or the amendment of the memorandum and articles of association or any other instruments regulating the business of any undertaking ; (*f*) the extent to which the provisions of the order can be altered by the undertaking ; (*g*) the continuation of any pending legal proceedings with such changes as may be necessary.

Where such an order as aforesaid is in the contemplation of the Government, it may, with a view to achieve that purpose, prohibit, restrict the doing of anything that might impede the operation or making of the order and may impose on any person such obligations as to the carrying on of any activities or the safeguarding of any assets, as it may think fit. The Government may even appoint a person to look after the activities or safeguarding of the assets.

If any offer of the undertaking ceases to hold office by reason of its division, he cannot claim any compensation.

Any default is punishable under Section 46 with fine which may extend up to Rs. 1 lakh and Rs. 1,000 for every day during which default continues.

Section 28 defines the philosophy of the Government on the question of concentration of economic power. The various considerations and criteria, which

the Central Government and the MRTP Commission adopt while handling cases of concentration and exercising their power are: efficient use of man, materials and other resources, economies of scale and production efficiency, defence needs, needs of home and export markets, technological development and dynamism, opening up of new markets and new development areas, balance regional growth, encouragement of new entrepreneurship.

It is clear from the above that some criteria are in favour of concentration, while others are in favour of diffusion. There is no hard and fast rule that all concentrations are prejudical to the public interest. In handling the proposals and postures of undertakings covered under the chapter, pragmatic and non-ideological view is advocated even by the provisions of the MRTP Act. Section 28 is intended to furnish the necessary perspective to the Central Government and MRTP functionaries in administering the Act.

Section 29' enjoins upon the Central Government to provide a reasonable opportunity to the interested undertakings to represent their case before any final decision either way is made. This is a part of natural justice to ensuse that all points of view are brought to bear on the final decision of the Central Government.

When an enquiry by the Commission is felt by the Central Govt. to be necessary, then the latter must refer the matter to the former within 60 days. However, if the Government calls for further particulars, the period of 60 days will begin from the date on which such further particulars are furnished. The Commission shall submit its report and opinion within 90 days of the reference; if it cannot do so, it must reeord in writing the special reasons therefor. The Central Government has to dispose of the matter within 60 days from the receipt of the Commission report. Section 30 further puts a statutory time limit of 90 days for disposal of applications for expansion, establishment of new undertakings, merger/amalgamation and acquisition proposals and appointment of directors, in case no reference is made to the M.R.T.P. Commission. If, however, the Commission is to be taken into confidence by the Central Government while dealing with the applications, the time-limit for disposal is 210 days.

Monopolistic Trade Practices:

Under Section 2 (*i*), a monopolistic trade practice means a trade practice which has or is likely to have the following effects:

(*a*) A practice which has the effect of maintaining prices at an unreasonable level. This may be attained by any method, *e.g.*, by limiting, reducing or controlling the production of goods or services.

(*b*) A practice which has the effect of unreasonably preventing or lessening competition in the production, supply or distribution of goods or services.

(c) A practice which has the effect of limiting technical development or capital investment or causing deterioration in the quality of goods or services to the common detriment.

Chapter IV (Sections 31 and 32) of the MRTP Act deals with monopolistic trade practices indulged in by monopolistic undertakings, if such practices are prejudicial to public interest. A monopolistic undertaking, is defined by the Act as a dominant undertaking (as defined earlier) or an undertaking together with not more than two other independent undertakings produces, distributes, supplies or controls not less than 1/2 of the total goods or services of any description produced in India. For purposes of this Section, two types of undertakings are covered :

(a) A dominant undertaking which by itself or together with inter-connected undertakings produces or controls not less than 1/3rd of the total quantity/value of a product or service, and whose assets taken alone or together with its inter-connected undertakings are of the value of Rs. 1 crore or above.

(b) An undertaking regardless of its assets and size, together with at least two other independent undertakings produces or controls not less than 1/2 of the total quantity/value of a product or service in India.

For purposes of bringing the second type of undertakings into the purview of the Section, the undertakings in question should be acting in concert or collusion. There has to be some evidence of joint action. Independent action in competition to each other does not attract the provision of this Section.

A monopolistic trade practice includes maintenance of prices at an articicially or unreasonably high level (or even a low level to drive out marginal competitors), limiting or regulating production and distribution of the product/service, attempt to limit competition among independent undertakings by collusive understandings and agreements, prevention of new competitors from entering the industry, allowing the quality of goods or services to deteriorate through deliberate neglect of technical development, capital investment, etc. All these practices indulged in by monopolistic undertakings in collusion with each other are monopolistic trade practices. A few major undertakings in an industry may collude and conspire with view to furthering their point and interests and to harm the interests of other competitors and the buying public at large. Even a single undertaking commanding a leading market share may take advantage of its position, indulge in such monopolistic trade practices, and hold the other competitiors and the consuming public to ransom. It is absolutely essential to curb such practices without any hesitation.

Monopoly power cannot be divorced from monopoly practice. By the very term, monoploy power means the ability of an undertaking alone or together with one or more other undertakings to exert control or influence over the structure and processes of the industry. By structre we mean the size, distribution of the business

units in the industry, the ownership and control structure in the industry, the number of business units in the industry and degree of free and open competition among them for inputs and output, and the degree of openness of the industry for new firms to enter. By processes, we mean the patterns of production and supply, management, production mix and production, pricing, advertising and distribution and so on. Regardless of the conditions and relations between supply and demand, it is possible, by means of monopoly power, to exploit consumers, general public, suppliers, other marginal producers, and so on. This implies that even in a buyer's market, monopoly power does not cease to be prevalent; only it may take different forms and adopt different tactics.

Before proceeding with cases of monopolistic trade practices, the Central Government should form a *prima facie* opinion as to the guilt of such practices being indulged in by one or more monopolistic undertakings by processes of collusion and conspiracy in any industry. Thereafter, the Central Government should refer (reference is mandatory) the case to the MRTP Commission for an inquiry, whereupon the latter will investigate the matter and report back to the Central Government. If the Commission's findings confirm the prevalence of monopolistic trade practices, the Central Government may pass suitable orders directing the undertakings concerned to 'cease and desist' from such indulgence. However, the Central Government is not bound to pass such orders; the matter is left to its discretion (the Commission's report is purely advisory). But if the Commission's findings are negative, the Central Government cannot pass any order. The nature of the Central Government's order may take the following terms :

(*a*) Directive to regulate production, supply, distribution or control of the specific goods or services.

(*b*) Fixation of quality standards, terms of sale, supply or prices.

(*c*) Directive to the undertaking or undertakings to discontinue pursuing monopolistic trade practices.

Restrictive Trade Practices.

According to Section 2(o), a restrictive trade practice means any practice which has or may have the effect of preventing, distorting or restricting competition in any manner. Thus, any agreement which is restrictive of competition, whatever be the manner of restriction, is a restrictive trad practice. Such a practice will be presumed in the following cases, namely, (a) if it tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions; or (*b*) if it tends to obstruct the flow of capital or resources into the stream of production.

Chapters V and VI deal with restrictive trade practices, the former being confined to the requirement of registration of restrictive trade agreements with the Commission (Sections 33 to 36), while the latter deals with control of such practices (Sections 37 to 41).

A restrictive trade practice means a trade practice having the effect of preventing, distorting or restricting competition, obstructing flow of capital and other resources into the stream of production or manipulating prices or supply of goods and services, so as to cause inconvenience and unnecessary additional cost to the consumers.

The following types of restrictive trade agreements are required to be registered with the Registrar of Restrictive Trade Agreements appointed by the Central Government.

1. Agreement between producers or whole-salers to restrict the persons or classes of persons to whom goods are sold or from whom goods are bought.
2. Agreements requiring purchasers of some goods to purchase some other goods as a condition for the sale of former type of goods.
3. Agreements restricting the freedom of wholesalers or retailers to stock or sell any other products than those of the said manufacturers (exclusive dealership agreements).
4. Agreement between producers, wholesalers or retailers to sell goods only at prices or other terms agreed upon between themselves (collusive price fixing).
5. Any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor.
6. Any agreement to limit restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods.
7. Areements to grant or allow discriminatory concessions or benefits including allowances, discounts, rebates or credit in connection with dealings.
8. Agreements stipulating the minimum resale price at the retail level (Resale price maintenance).
9. Agreement for the exclusion of a person carrying on a particular trade from the concerned trade association.
10. Agreement not to employ or restrict the employment of any method, process or machinery in the manufacture of goods.

11. Any agreement which the Central Government may proclaim to be a restrictive trade agreement pursuant to the recommendation of the MRTP Commission.

It is apparent that all the above types of agreements have the likely effect of preventing, distorting and reducing free competition among manufactures and sellers, apart from damaging the interests of the consuming public.

The aforesaid provisions shall apply, so far as may be, in relation to agreements making provision for services as they apply in relation to agreements connected with the production, supply, distribution or control of goods. When an agreement of the above kind is made with the Central Government or with anybody with its authority, then it shall not require registration.

Under Section 35, the Central Government shall, by notification in the Official Gazette, specify a day (hereinafter referred to as "the appointed day") from which every agreement falling within Section 33 shall become registrable under the Act. However, different days may be appointed for different categories of agreements. Within 60 days from the appointed day—if the agreement existed on that day an application for registration of agreement (referred to in Section 33) has to be filed with the Registrar. And if the agreement is made after the said appointed day, then it is to be furnished to the Registrar within 60 days from the making of the agreement. Such application to the Registrar shall contain such particulars as the names of the persons who are parties to the agreement and the whole of the terms of the agreement. If the particulars of an agreement thus registered undergo a change as to its terms or parties or if the agreement is determined before the expiry of the term, then the fact has to be brought to the notice of the Registrar within one month after the date of the change or determination.

If the agreement or alteration thereof (as aforesaid) is in writing, then either the original document or its true copy has to be produced for registration ; if not, then a memorandum of its terms, signed by the person who is furnishing the particulars, has to be produced. The particulars shall be furnished by a person who is or was a party to the agreement.

Where an agreement of this kind is in reference to goods or services dealt with in India and a party to the agreement carries on business in India, the agreement would require registration even if the other parties are not carrying on business in India.

Where an agreement is made by a trade association, the agreement shall be deemed to be made by persons who are members of the association or represented in it. Each such member shall be treated as a party to the agreement.

Where specific recommendations—whether express or implied—are issued by a trade association to its members or any class of them, recommending to them a course of action about any matter affecting their trade conditions, the agreement for the constitution of the association will require registration.

It may be noted that under Section 34 of the Act, an office of the Registrar of restrictive trade practices has to be established under this Act. This office is meant for registering agreements which are registrable under this Act. The Registrar has also to perform other functions imposed on him by the Act. The Central Government is empowered to appoint as many persons as it may think fit to be Additional, Joint, Deputy or Assistant Registrars to assist the Registrar in the performance of his functions under the Act.

Under Section 36, a register has to be maintained by the Registrar. Therein the particulars of agreements filed with him have had to be entered. The Registrar shall maintain a special section or part of the said register for filing such particulars as the commission may direct. Such particulars may contain information, the publication of which is opined by the Commission either to be contrary to the public interest or to be likely to damage substantially the legitimate business interests of any person. It is open to any party to apply to the Registerar (*i*) for the inclusion of an agreement or any part of it in the special section, or (*ii*) for the exclusion of an agreement or any part of it from the requirement of registration on the ground that it has no substantial economic significance. Such an application has to be referred to the Commission by the Registrar, and will be disposed of by him according to the general or special instructions issued by the Commission. Thus, under this Section, the actual authority rests with the Commission and it also contemplates the making of regulations by the Commission under Section 66. The provision relating to the exclusion of an agreement which is of no substantial economic significance for the requirement of registration, is very natural. A restrictive trade practice is not an evil in itself, but is so only in so far as it is injurious to the public. Thus, an agreement which is restrictive in form but has no economic significance from the standpoint of public interest, is as good as non-existent for the purposes of this Act.

Section 37 vests overriding authority with the Commission to investigate into any restrictive trade agreement or practice or understanding which may come before it for enquiry (whether such agrreement is registered with the Commission or not). The Commission may initiate the investigation on its own information or knowledge or in response to specific complaints by consumers or consumers' associations, or on a reference made by Central or State Governments, or on a complaint made by the Registrar of Restrictive Trade Agreements.

The Director of Investigation attached to the Commission will first find out whether the said trade practice or understanding or agreement comes under the

definition of restrictive trade practice as given in the M.R.T.P. Act. The next step is to make the necessary investigation to establish conclusively whether the particular practice is prejudicial to the public interest. If the Commission comes to the conclusion after investigation that the particular trade practice is so prejudicial to the public interest, it will pass orders directing the parties to the agreement or understanding or practice concerned to discontinue the practice (cease and desist) or to modify or delete the offending parts of the agreement or understanding or practice in ways which cease to be prejudicial to public interest. As already stated, a restrictive trade practice, followed by a monopolistic undertaking becomes a monopolistic trade practice and in such a case, the Central Governmet and not the Commission is competent to pass orders.

Under sub-section (2) of Section 37, if the party to any restrictive trade practice contained in an agreement requests that he will himself modify the agreement so as to avoid the prejudicial element, the Commission may, instead of making an order under Section 37, delimit time for the purpose ; should the Commission be satisfied that the agreement has been so modified, it may not make any order in regard to such practice. Sub-section (3) debars the Commission from making any order regarding an agreement for sale of goods which are bought not for resale but, for self-consumption and also regarding a practice which is expressly authorised by any law for the time being in force. Under Sub-section (4), if, in the course of an enquiry, the Commission finds that a monopolistic undertaking has been indulging in restrictive trade practices, then it may pass such orders as it may think fit ; then it may refer to the Central Government the matter together with its findings as to any monopolistic trade practice. The Government may take the necessary action in exercise of its powers under Section 31.

Some points are important in this context. The Commission conducts only an enquiry and not a trial in regard to any restrictive trade agreement or practice. The Commission's 'cease and desist' orders do not involve any positive punishment as such. The particular practice is just prohibited or is made invalid. In case, however, the parties to the outward agreements or practices violate them, then only the question of trial and punishment arises.

According to Section 38, for the purposes of any proceedings before the Commission all restrictive trade practices or agreements or understandings shall be deemed to be prejudicial to the public interest unless the Commission is satisfied on any one or more of the following circumstances. The burden of proving existence of the exempting circumstanees lies upon the concerned parties to the agreement or understanding or practice. The parties have also to prove that, on the balance of circumstances and facts, the agreement or understanding cannot be considered unreasonable.

(a) Protection of public against injury. In other words, the restriction is meant to protect the public's interest.

(b) The restriction is positively beneficial to the public in specific and substantial ways.

(c) The restriction is just a counter-measure against another restriction by other competing firms.

(d) Restriction is in the interests of protecting export business.

(e) Restriction in the interest of maintaining employment.

(f) Other restrictions which are reasonably required for purposes connected with the maintenance of a restriction which the M.R.T.P. Commission has upheld.

(g) On balance, the said restriction does not discourage competition.

Sub-section (2) of Section 38 provides that "purchasers", "consumers" and "users" include persons purchasing, or consuming or using for, or in the course of, trade or business for public purposes ; and references to any one person include references to any two or more persons being inter-connected undertakings or individuals carrying on business in partnership with each other.

The Commission is expected to weigh the generally beneficial effects against the harmful effects of the agreements or practices before it is satisfied as to the permissibility or otherwise of the same.

Section 39, 40 and 41 deal with a particular restrictive trade practice, namely the extensive practice of "resale price maintenance" whereby a retailer or trade is compelled to sell products (which he buys for resale purposes) at a minimbm price stipulated by the wholersaler or producer. This practice is declared void statutorily. The Act also protects those retailers or traders who refuse to abide by restrictive stipulations of the wholesalers or producers in regard to resale price maintenance, from being victimised in any way. Certain exemptions from the provisions are provided if the concerned parties are able to satisfy the Commission that the practice of resale price maintenance in the case of particular class of goods or services is in public interest to the extent that it is anti-inflationary and that otherwise the quality of the goods or services will deteriorate.

Section 39 (1) provides that any term or condition of a contract for the sale of goods by a person to a wholesaler or retailer or any agreement between a person and a wholesaler or retailer relating to such sale is void in so far as it purports to establish or provide for the establishment of minimum prices to be charged on the resale of goods in India. It may be noted that whereas all

other forms of restrictive practice becomes void only by an order of the Commission after an enquiry, resale price maintenance is statutorily declared void.

Section 39 (2) provides that no supplier of goods—whether directly or through any person or association of persons acting on his behalf—shall notify to dealers or otherwise publish on or in relation to any goods a price stated or calculated to be understood as the minimum price which may be charged on the resale of the goods in India. Thus, this provision forbids the trade association in any way aiding such a price.

Section 39 (3) extends this prohibition of resale price maintenance as much to patended goods (including articles made by a patended process and articles made under any trade mark) as to other goods. And notice of any term or condition which is void by virtue of Section 39 or which would be so void if included in a contract of sale or agreement relating to the sale of such articles shall be of no effect for the purpose of limiting the right of a dealer to dispose of that article without infringement of the patent or trade mark, as the case may be. But according to the proviso to this sub-section, the validity of any term of condition of a licence granted by the proprietor (or licensee or assignee) of a patent or trade mark, which regulates the price of any patented article, is not affected by Section 39 even though such regulation of price seeks to fix a minimum price at which the patented article may be sold by the proprietor, licensee or assignee.

Section 40 of the Act deals with the prohibition of other measures for maintaining resale price. Accordingly, sub-section (1) enjoins that no supplier shall withhold supplies of any goods from any wholesaler or retailer seeking to obtain them for sale in India on either of the grounds that : (*a*) the wholesaler or retailer has sold in India at a price below resale price goods obtained from that supplier, or has supplied such goods to a third party who had done so ; (*b*) the wholesaler or retailer is likely, if the goods are supplied to him, to sell them in India at a price below that price or supply them to a third party who would be likely to do so. Thus, the supplier is prevented from withholding the sale of goods to such a dealer in order to pressurize him to follow the supplier—enforced resale price maintenance. However, sub-section (2) permits such withholding of sale by the supplier, if the buyer's intention in purchasing the goods is to use them merely as *loss leaders* [*i.e.*, selling goods (otherwise than in a genuine seasonal or clearance sale) not for making profits but just for attracting to the establishment customers who are likely to purchase other goods or otherwise for advertising his business].

Sub-Section (3) specifies certain cases in which a supplier shall be deemed to be withholding supplies from a dealer, *e.g.*, (*i*) if he refuses or fails to supply those goods to the order of the dealer ; (*ii*) if he refuses to supply those goods to

the dealer except at prices, or on terms or conditions as to credit, discount or other matters which are less favourable than those at or on which he normally supplies those goods to other dealers carrying on business in similar circumstances; or (*iii*) if he treats a dealer, notwithstanding a contract with such dealer for the supply of goods, in a manner less favourable than that in which he normally treats other dealers in respect of time or methods of delivery on other matters arising in the performance of the contract.

A supplier shall not be deemed to be withholding supplies of goods, if, in addition to either of the grounds referred to in sub-section (1), he has any other ground which alone would entitle him to withhold such supplies. In other words, if the supplier has any other valid ground (than either of the aforesrid grounds) to withhold the supply to enforce resale price maintenance, he cannot be guilty of "withholding the supply".

Section 41 of the Act empowers the Commission to grant exemption to any goods from the operation of Sections 39 and 40. It may be granted on a reference being made by the Registrar or by any other interested person. The exemption may be granted if the Commission is satisfied that in the absence of a minimum resale price system—(a) the quality of the goods or their variety would be substantially reduced to the detriment of the public as consumers or users; or (b) the retail prices would, in general and in the long run, be increased to the deteriment of the public as such consumers or users; or (c) the necessary services actually provided with the sale of the goods by retail would ceases or be reduced substantially to the detriment of the public as consumers or users.

INVESTIGATION, PENALTIES AND MISCELLANEOUS PROVISIONS

Information and Inspectors

Section 42 deals with the Registrar's power to obtain information. If the Registrar reasonably believes that a person is a party to an agreement containing a restrictive trade practice and consequently it is registrable under the Act, he may serve notice upon such person at any time but not less than that of 30 days. The notice has to ask him to state whether he is a party to any such agreement; if so, he has to furnish to the Registrar such particulars of the agreement as may be specified in the requisition. Such person or any other person who is also a party to the agreement can be required by the Registrar to furnish unto him further documents or information which are in his possession or control.

Where a notice under Section 42 is required to be served on an association it may be served on the secretary, manager or other similar office of the association and the association itself will be treated as a party to the agreement to which the association is a party.

Whenever the aforesaid particulars as called for by the Registrar are not furnished, he shall apply to the Commission whereupon the Commission may: (*a*) order the person or association to furnish the particulars within the time specified in the order; or (*b*) authorise the Registrar to treat the particulars or information in any document already in his possession as the particulars relating to the agreement; or (*c*) restrain the parties from acting on the agreement, if the Commission is satisfied that the refusal to furnish the information is wilful.

Section 43 empowers the Central Government to call, by a general or special order, upon any undertaking to furnish to the Govt. periodically or as and when required any information concerning the activities carried on by the undertaking, its connections with the other undertakings. Information may also be required as to the organisation, business, cost of production, conduct, trade practice or management of the undertaking in order to enable the Government to carry out the purposes of the Act.

Section 44 provides for the power to appoint Inspectors. If the Central Government is of the opinion that an undertaking has been indulging in a monopolistic or restrictive trade practice or trying to acquire control over any dominant or inter-connected undertaking, then the Govt. may appoint one or more inspectors in order to make an *investigation* into the affairs of the undertaking. The inspector thus appointed shall have the powers and privileges which are accorded to an inspector under Sections 240 and 240A of the Companies Act, 1956.

Offences and Penalties (Section 45 to 53)

OFFENCE	*PENALTY*
(*a*) Contravention of Section 21	Fine extending up to Rs. 1 lakh.
(*b*) Contravention of Sections 22, 23, 24 or 27.	Fine extending up to Rs. 1 lakh and Rs. 1000 for every day, after the first day, during which the contravention continues.
(*c*) Contravention of Section 25	Fine up to Rs. 2,000 and Rs. 200 for every day, after the first day of default.
(*d*) (*i*) Failure to register an agreement containing restrictive trade practice	Fine up to Rs. 5,000 and Rs. 500 for every day after the first day of default.
(*ii*) Failure to register an undertaking	Fine up to Rs. 1,000 and Rs. 50 for every day of default.

(*e*)	(*i*) Furnishing of false particulars etc., supplies or destruction of any material document.	Imprisonement up to 6 months or fine up to Rs. 5,000 or both.
	(*ii*) Failure to furnish information u/ss 43 or 42.	Imprisonment up to 3 months or fine up to Rs. 2,000 or both and Rs. 100 for every day of default.
(*f*)	Failure to comply with orders u/ss 13, 31, 37	Imprisonment up to 6 months or fine up to Rs. 5000 or both and up to Rs. 500 for every day of default.
(*g*)	Violation of resale price maintenance agreements under sections 39 and 40.	Imprisonment up to 3 months or fine up to Rs. 5,000.
(*h*)	Wrongful disclosure of information contemplated by Section 60.	Fine up to Rs. 500 or imprisonment up to 6 months or both.

Miscellaneous

(*i*) *Power to impose conditions*: Under Section 54, the Central Government may, in granting its approvals or exemptions under the Act, impose any conditions it likes and also modify any scheme of finance. In case these conditions are not fulfilled, it may rescined or withdraw the approval, sanction, permission, confirmation, recognition, direction, order or exemption made or granted by it.

(2) *Appeals*: The orders of the Central Government as well as of the Commission are appealable. Appeal is to be made to the Supreme Court on any of the grounds specified in Section 100 of the Civil Procedure Code. The time for appeal is 60 days from the date of the order (Section 55).

(3) *Jurisdiction as to offences* (*Sections 56 to 58*): The offences under the Act can be tried only by a Presidency or first class Magistrate. A court can take cognizance of any offence punisbable under the Act only on a report in writing of the facts constituting such offence made by a person who is a public servants as defined in Section 21 of the Indian Penal Code. The Presidency Magistrate or the first class Magistrate is empowered to impose heavy fines under Sections 45 and 46 of this Act, inspite of the fact that Section 32 of the Code of Criminal Procedure limits their normal power to the imposition of fines up to Rs. 1,000 only.

(4) *Protection regarding statements made to the Commission*: Section 59 ensures any one giving evidence before the Commission that a statement made by him shall not be used against him in any civil or criminal proceedidgs.

But if the statement is false, he can be prosecuted for giving false evidence. The protection is available if the following two conditions are fulfilled, namely, (i) the statement is made in answer to a question put to him by the Commission ; and (*ii*) it is relevant to the subject-matter of the enquiry.

(5) *Restriction on disclosure of information* : Section 60 ensures an undertaking or company that any information collected from them by the Commission shall not be disclosed to others except for the purposes of this Act without the previous permission in writing of the owner. Therefore, no one should labour under any misapprehension that information obtained in respect of an undertaking will be made available to its business rivals and others except with the consent of the owner of the undertaking. But such disclosure of information is permissible only in connection with the legal proceedings pursuant to the Act or in connection with any criminal proceedings taken in pursuance of the Act or otherwise.

(6) *Power to require report* : Under Section 61, the Central Government may, at any time, require the Commission to submit to it a report on the general effect on the public interest of such trade practices as, in the opinion of the Govt., either constitute or contribute to monopolistic or restrictive trade practices or concentration of economic power to the common detriment.

Under Section 62, the report of the Commission relating to the execution of the provisions of this Act and an annual report have to be laid by the Central Government before both Houses of Parliament.

By virtue of Section 63, every member of the Commission, the Director and the Registrar, and every member of the staff of the Commission, and of the Director and the Registrar shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. Section 64 lends protection to all these persons in respect of any aetion taken by them in good faith under this Act. No suit will be maintainable against the Central Government or its officers or employees for any damage caused by anything done in pursuance of the Act.

(7) *Inspection of Register* : The register maintained by the Registrar. other than the special section, is open to public inspection. The hours of, and the fees for, inspection can be prescribed by the Central Government ; but the fees must not exceed Rs. 25. The special section of the register being confidential in character, it shall not be open to public inspection. A demand may be made for extracts from the register on payment of the prescribed fee, which must not exceed Re. 1/- for 100 words. Excerpts from such register as certified by the Registrar shall be admissible in evidence in legal proceedings (Section 65).

You will have observed that the M.R T.P. Act deals with :

A. Notice or Application to the Central Govt. by undertakings to whom Part A of Chapter III applies; (*i*) Certain undertakings are required to be registered

with the Central Government. Such undertakings are those contained in Section 20 discussed earlier. The provisions of Sections 26, 21, 22, 23 (2), 23 (4) & 25. The provisions are as under :

Section 26 (*Registration of undertaking*). Read the provisions discussed hereinbefore and note that : (*a*) the application for registration has to be in Form VI ; (*b*) if the provisions of Part A of Chapter III shall ever cease to apply subsequent to the registration, the *undertaking* is at liberty to make an application for deregistration ; (*c*) The term 'undertaking' means [vide Section 2 (*v*)] an undertaking which is engaged in the production, supply, distribution or control of goods of any description of service of any kind. If the business undertaking of the company is nationalised, the company ceases to be an undertaking within the meaning of the Act ; (*d*) one of the criteria for registration is the value of assets, which, in relation to an undertaking, means the value of its assets as shown in its books of account after making provision for depreciation or for renewals or diminition value. The determination of value is controversial. But the Central Govt. takes value ass hown on the assets-side of the balance sheet of a company (exclusive of accumulated losses and miscellaneous expenditure not written off) as the value of assets of that company. Such figure may include investments in or loans to *inter-connected* undertakings.

Section 21 (*Substantial Expansion*) : In this context, note that : (*a*) Substantial expansion occurs : (*i*) if there is an increase *in value of assets* by 25% or more in the case of an undertaking or other than a dominant undertaking ; or (*ii*) if there is an increase in the *production, supply or distribution of goods or the provision of services* by 25% or more in the case of *all* undertakings registered under Part III. (*b*) The aforesaid increase should be the result of increase in activities : (*i*) by the issue of fresh capital ; or (*ii*) by the installation of new machinery or other equipment ; or (*iii*) *in any other manner* (This phrase falls within the compass of *Ejusdem Generis* rule). (*c*) It is open to the Central Government to refer the proposal for substantial expansion to the MRTP Commission for enquiry before passing order thereon. (*d*) Once the Central Govt. approves the expansion, the compnny cannot modify the scheme or the relative scheme of finance without the Govt.'s previous approval. (*e*) Restrictions are inapplicable to any industrial under taking (which is not a dominant undertaking) to which Section 13 of the Industries (Development and Regulation) Act applies, in so far as the expansion relates to prodnction of the same or similar type of goods. (*f*) The categories of goods must be ascertained with reference to MRTP (Classification of Goods) Rules, 1971 (Annexure I).

Section 22 (*New Undertaking*) : Note that : (*a*) Previous permission of the Central Government is necessary. (*b*) The application should be in Form II and set out the following information, namely, inter-connection (after establishment) with other undertakings ; scheme of finance ; and such other information as may be

prescribed. (*c*) Modification in any scheme of finance on the strength of which the Central Govt., approved the establishment of a new undertaking is permissible only with the previous ayproval of the Govt.

Section 23 (*Merger or Amalgamation*) : Note that : (*a*) The following schemes cannot be sanctioned by any Court or be recognised for any purpose or be given effect to, unless the schemes have been approved by the Central Government, *viz.*, (*i*) the scheme of merger or amalgamation of an undertaking registered/registrable under the Act with any other undertaking ; (*ii*) the scheme of merger or amalgamation of 2 or more undertakings which have the effect of bringing into existence an undertaking registrable under the Act. (*b*) The application shall be in Form III. (*c*) Scheme of merger or amalgamation of such inter-connected under-takings as are not dominant undertakings and produce the same goods (within the meaning of the MRTP (Classification of Goods) Rules, 1971) needs no approval. If the scheme has been effected in contravention of the Act, the Central Govt. may direct the undertaking concerned : (*i*) to cease and desist from such contravention ; (*ii*) to divest itself of the stock or other share capital or assets so acquired ; and (*iii*) to carry out any other direction of the Govt.

Section 23 (*Acquisition of other undertaking*) : (*a*) It is necessary to obtain Central Government's approval if an undertaking registered/registrable under the Act proposes to acquire by purchase, take-over or otherwise the whole or part of an undertaking which will or may result either in the creation of an undertaking registrable under the Act or in the undertaking becoming inter-connected with an undertaking registrable under this Act. (*b*) Form IV prescribed. The application should contain information in respect of : (*i*) inter-connection with other undertakings ; (*ii*) scheme of finance regarding the proposed acquisition ; and (*iii*) such other particulars as may be prescribed. (*c*) After the approval of the proposal, neither it nor the relative scheme of finance can be modified except with previous approval of the Central Govt. (*d*) Restrictions do not apply to any acquisition where both undertakings are not dominant and produce the same goods (with the meaning of the MRTP (Classification of Goods) Rules, 1971) ; the exemption is not, however, applicable, if, as a result of the acquisition, an undertaking comes into existence, to which Section 20 (*a*) or (*b*) would apply. (*e*) The consequences of contravention of the Act are the same as mentioned in the preceding paragraph.

Section 25 (*Appointment of Directors*) : Read the Section discussed earlier and note : (*a*) That prior approval of the Central Govt. is required for appointment of a person as director of any undertaking if he is a director of more than 10 inter-connected undertaking registered/registrable. (*b*) Though the non-obtainment of the approval renders the appointment void, nevertheless any act done by the director is not invalid merely by reason of the void appointment,

Authority to whom notice u/s 21 and applications under other Sections of Chapter III to be submitted: Dept. of Comp. Affairs, Ministry of Law, Justice and Company Affairs, Shastri Bhavan, Dr. Rajendra Prasad Rd., New Delhi-1.

Time limit (*Section 30*). (*a*) The Govt. (Dept. of Comp. Affairs) has the option, in case of necessity, to refer the matter to the MRTP Commission for enquiry before giving a decision. (*b*) Such reference has to be made within 60 days from the date of receipt of the Notice or Application and the Commission to report thereon within 90 days from the date of reference. (*c*) Govt. has to dispose of the matter within 90 days from the date of the receipt of the Notice or Application, where no reference is made to the Commission for enquiry. (*d*) Further particulars being called for by the Govt., the prescribed period has to be computed from the date of furnishing such particulars. (*e*) Period for taking decision by the Govt. or Commission is extendable for special reasons recorded by it in writing.

Consideration for Application (*Section 29*). (*a*) Any person thought to be interested in the matter under the Govt.'s consideration has to be given a reasonable opportunity of being heard; Commission, in case of reference, also to give opportunity to the person interested tn the matter to present his view in the matter.

Guiding Principles (*Section 28*): The Central Govt., in exercising its power under Chapter III, has to take into account all matters which appear in the particular circumstances to be relevant. Among other things, regard shall be had to the need consistently with the general economic position of the country: (*i*) to achieve the production, supply, distribution, by most efficient and economic means, of the goods of such types and qualities in such volume and at such prices as will best meet the requirements of the defence of India, and internal and international markets; (*ii*) to have the trade organised in such a way that its efficiency is progressively increased; (*iii*) to ensure the best use and distribution of men, materials and industrial capacity in India; (*iv*) to effect technical and technological improvements in trade and expansion of existing markets and the opening of new markets; (*v*) to encourage new enterprises as a countervailing force to the concentration of economic power to the common detriment; (*vi*) to regulate the control of the material resources of the community to subserve the common good; and (*vii*) to reduce the disparities in relation to areas which have remained distinctly backward.

B. Registration of Agreements relating to Restrictive Trade Practices

1. *Registrable Agreements* (*Section 33*). Any agreement falling within one or more of the categories specified in the Section needs registration with the Registrar of Restrictive Trade Agreements. All these categories have already been mentioned at pages 21-22 of this Study Paper.

2. *Exemption from Registration*. The following agreements are exempt from registration, *viz.*, (*i*) any agreement expressly authorised by or under any law

for the time being in force; (*ii*) any agreement having the approval of the Central Government; and (*iii*) any agreement to which the Government is a party.

3. *Restrictive Trade Practice* [*S. 2(0)*]. Read the discussion of this topic from pages 21—22 of this Study Paper and note that Trade Practice means any practice relating to the carrying on of any trade and includes (*i*) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders, (*ii*) a single or isolated action of any person in relation to any trade.

4. *Registration of Agreements* (*Section 35*). Read the discussion of the Section from page 22 of this Study Paper. Accordingly, all the 11 agreements mentioned at pages 21-22 (supra) have become registrable with effect from Dec. 1, 1970.

5. *Time-limit*. All agreements in force as on Dec. 1, 1970 should have been registered within 60 days therefrom. An agreement made after the said *date* needs be registered within 60 days from the making thereof.

6. *Form*. None prescribed. However, the following particulars in respect of every agreement have to be furnished to the Registrar, *viz.*, (*i*) the names of the persons who are parties to the agreement and (*ii*) the whole of the terms of the agreement. 4 copies of the agreement needing registration may be sent along with a covering letter. The copies should be duly verified as true copies. If the agreement is not in writing then a memorandum in writing should be preferred and filed, signed by the person by whom the particulars are furnished. The company should also furnish a certificate in Form VIII signed by the person.

7. *Applicant*. Any party to the agreement or his duly authorised agent may file it. Thereupon, the provisions relating to registration are deemed to have been complied with by all persons concerned.

8. *Parties to the Agreement*. Note: (*i*) It is not essential that both the parties should be carrying on business in India. Suffice it would, (*a*) if the agreement relates to production, supply, distribution or control of goods or the performance of services in India, and (*b*) if any party to the agreement carries on business in India. (*ii*) In respect of an agreement entered into by a trade association, all persons who are members of the association are deemed to be parties to the agreement. (*iii*) A trade association itself is considered as a party to an agreement and the agreement for the constitution of the association is registrable in cases where the association gives to the members specific recommendations express or implied.

9. *Place of filing*. The Registrar of Restrictive Trade Agreements, Department of Company Affairs, Travancore House, Kasturba Gandhi Marg, New Delhi.

10. *Fee*. No filing fee.

11. *Variation of Determination*. Any variation or change in the Agreement already submitted for registration must be notified to the Registrar within ONE

month from the date of such change. If any agreement is determined otherwise than by efflux of time, particulars of determination are required to be filed within ONE month from the date of determination.

12. *Exemption.* Any party to the Agreement may apply for exemption from registration of the Agreement or any part thereof on the ground that the agreement or part thereof has no substantial economic significance.

13. *Register* (*Section 36*). Already discussed at page 23 of this Study Paper. The Register – other than the Special Section—may be inspected by the person upon payment of a fee of Rs. 10.

14. *Penalty for failure to register Agreements without reasonable cause.* Fine extending to Rs. 5,000/- ; in case of continuing offence, a further fine up to Rs. 500/- for every day after the first during which the failure continues.

M.R.T.P. RULES

Section 67 of the M.R.T.P. Act empowers the Central Government to make rules (by notification in the Official Gazette) to carry out the purposes of this Act. In exercise of this power, the Central Government which had made rules under the name and style of Monopolies and Restrictive Trade Practice Rules, 1970 further amended them under the style of MRTP (Amendment) Rules, 1976. These rules are briefly summarised below.

Rule 2 (*i*) : The word "form" mentioned in these rules means a form specified in the *Schedule* to these rules.

N-B. For any such Form, students should refer to Sengupta on the Monopolies and Trade Practices Act of 1980 Edition-Published by Eastern Law House (P) Ltd., 54 Ganesh Chunder Avenue Calcutta-700013.

(*ii*) *Where the undertaking is owned by a body corporate.* "Principal officer" in relation to an undertaking means (*i*) the managing director of the body corporate or (*ii*) any other director, manager or *secretary* of the body corporate, who has been authorised by the Board of Directors of such body corporate by means of a resolution in that behalf. It may, therefore, be remembered that a company secretary must be thoroughly conversant with the M.R.T.P. Act and the rules framed thereunder for discharge of his statutory duties.

Specimen Resolution regarding Principal Officer

"Resolved that any one of the directors or the secretary for the time being of the Company be and is hereby authorised to sign on behalf of the Company all letters, forms, applications and other documents prescribed or required to be submitted to the Central Government and/or to the M.R.T.P. Commission under the M.R.T.P. Act, 1969 and the Rules prescribed thereunder'.' (Board resolution)

Where the undertaking is owned by a firm, principal officer means any partner thereof and *where it is owned or controlled by an individual or association of individuals or persons*, principal officer means any individual who is in charge of the management of such undertaking.

Rule 3 : *Notice or application* to the Central Government under the Act has to be sent to the Department of Company Affairs of the Government, along with 11 copies thereof. But in respect of applications made under Sections 25 and 26 of the Act, these are to be accompanied by one copy and 4 copies thereof respectively.

Rule 4 : Repeated.

Rule 4 A : (1) Before giving a notice under sub-section (1) of section 21 or making an application under sub-section (2) of section 22, or sub-section (2), or sub-section (4) of section 23, there shall be published, by or on behalf of the undertaking, person or authority giving the notice or making the application, a general notice to the members of the public in Form I-A, Form II-A, Form III-A or Form IV-A, as the case may be in the manner specified in sub-rule (3). (2) The Central Government may, if it is satisfied that any person interested in the matter was prevented by sufficient cause from making a representation to the Central Government within the period of fourteen days specified in a general notice published under sub-rule (1), permit such person to make such representation within a further period not exceeding fourteen days. (3) Every publication of a general notice referred to in sub-rule (1) shall be made—(i) at least once in a journal relating to trade in India ; (ii) at least once in an English daily newspaper circulating in the whole or substantially the whole of India ; (iii) at least once in a newspaper published in the language of the region in which—(a) the principal office of the undertaking, or if the undertaking is a company, the registered office of the company, is situate ; or (b) the person or authority giving the notice or making the application is resident or carries on business or personnally works for gain and (iv) at least once in a newspaper published in the language of the region in which—(a) the substantial expansion is proposed ; or (b) the new undertaking is proposed to be established ; or (c) the new undertaking coming into existence as a result of merger, amalgmation or acquisition, is proposed to be established, if such region is different from the region specified in clause (iii). (4) A copy of every publication under sub-rule (3) together with a certificate as to the date of publication thereof shall be attached to the notice or application, as the case may be.

Contents of General Notice : (*a*) To indicate the substance of the Notice or the Application, as the case may be. (*b*) To state that any person interested should (if he so pleases) intimate to the Govt. (*i*) his views on the proposal (if any) and (*ii*) the nature of his interest therein.

Publication of General Notice. To be published once in : (*a*) a journal relating to trade in India, *e.g.*, Indian Trade Journal, Commerce, Indian Finance, Capital etc., (*b*) an English Daily circulating in the whole or substantially the whole of India, *e.g.* Statesman, Times of India, Hindu, Indian Express, etc.

Submission of copies of Notice : Copies of notices published as aforesaid should be attached to notice under Section 21 or applications under other sections along with the certificates (as to the date of publication) of the person (s) making such publication.

Rule 5 : *Notice under Section 21* shall be in Form I and be accompanied by a treasury challan or a receipt from the bank evidencing the payment of a fee of Rs. 200/-. The Department of Company Affairs, on receipt of the said notice, must record therein the date of its receipt and communicate forthwith such date to the undertaking. Before referring the notice to the Commission or before passing any order thereon, the Central Govt. may require the undertaking to furnish additional information within a period to be specified by the Govt. The Central Govt., may, however, (by general or special order) specify any other form of notice than Form I. The specification of the form other than Form I can be made if it is thought to be necessary or expedient so to do in the interests of the defence of India, security of the State or in the public interest.

Rule 6 : As regards application under Section 22(2) (regarding New Undertaking) of the Act, all the provisions of Rule 5 shall apply, except that the application has to be in Form II.

Rule 7 : In respect of an application under Section 23 (regarding Amalgamation or Merger and Acquisition) of the Act, all the provisions of Rule 5 shall apply, except that the application has to be in Form III.

Exemption : Govt.'s approval is not necessary to a scheme of Merger or Amalgamation if the undertakings : (*i*) are interconnected, (*ii*) are not dominant undertakings and (*iii*) produce the same *goods* [Section 23(3). The term "goods" having the same meaning as imputed to it by the M.R.T.P. (Classification of Goods) Rules, 1971.]

The Application for Acquisition of undertakings under Section 23(4) has to be in form IV. Once such proposal has been approved by the Central Government, the proposal on the relative Scheme of Finance is unmodifiable except with the previous permission of the Govt. [Section 23(5)].

Rule 8 : An application under Section 25 (regarding Appointment as a Director) of the Act shall be in Form V. Also it mnst be accompanied by a treasury challan or a receipt from the bank evidencing the payment of a fee of Rs. 50/-.

Rule 9 : Every application for registration made under Section 26(1) (regarding Registration of Undertakings) of the Act shall be in Form VI and accompanied by a treasury challan or a receipt from the bank evidencing the payment of a fee of Rs. 150/-. On the receipt of the application, the Department of Company Affairs shall note thereon the date of its receipt and forthwith communicate such date to the undertakings. The certificate of registration to be issued under Section 26(2) shall be in Form VII. In case of loss, destruction or

mutilation of this registration cerificate, a duplicate may be granted on payment of a fee of Rs. 25/-.

Rule 10 : Fees payable under the Act or any rule or regulation made thereunder have to be paid into the Public Account of India at any Govt. Treasury or into the Reserve Bank of India or any office of the State Bank or any subsidiary thereof acting as the agent of the Reserve Bank for credit under head "104—Other General Economic Services—Fees Realised under MRTP Act. 1969—(*i*) Fees Realised by the M.R.T.P. Commission and by the Registrar of Restrictive Trade Agreements (*ii*) Application fees realised by the Central Government under the M.R.T.P. Act, 1969."

Rule 11 : A person desirous of inspecting the register (other than the special section thereof) has to apply to the Registrar together with the treasury challan or a receipt from the bank evidencing the payment of a fee of Rs. 10/-. The inspection may be allowed at any time between 10.30 a.m. and 4 p.m. on any day other than Sundays and public holidays and second Saturdays of each month. The inspection may be allowed either in the presence of the Registrar or his authorised deputee. Though extracts of any particulars cannot be taken, yet any points from the particulars can be allowed to be taken note of. For a certified copy of, or an extract from the particulars entered in the register (other than the special section thereof), person shall apply to the Registrar together with a fee of Re. 1/- for every 100 words.

Rule 12 : It deals with the procedure to be followed in furnishing particulars of agreement registrable under Chapter V of the Act.

Firstly, the following things have to be delivered or sent to the Registrar within the period specified in Section 35(2) of the Act. These are : (*a*) 4 copies of each document mentioned in relation to the agreement, referred to in the third procedure below, one such copy being signed or identified by the signature of the person furnishing it ; (*b*) along therewith, a certificate in Form VIII signed by the person furnishing such copies. It is to be certified that there are comprised in those copies the whole of the terms of that agreement and the names of the persons who are parties to it (including in the case of an agreement made by a trade association, all persons who are members of the association or are represented thereon by such members).

Secondly, there may be a case where any person is a party to numerous agreements and these agreements, except for the identity of another party thereto or the date thereof or both, are in the same form. In such a case, he may, instead of complying with the procedure mentioned in the preceding paragraph, he may deliver to the Registrar : (*a*) 4 copies of each document (specified in the third procedure mentioned in the immediately succeeding paragraph), setting out the whole of the terms common to an agreements. One copy of each such document has to be signed or identified by the signature of the person furnishing it ; (*b*) along

therewith 4 copies of lists indicating, respectively, the name and address of each person who is a party to all those agreements and names of the persons each of whom is a party to one of them ; and (*c*) a certificate in Form VIII signed by the person furnishing those copies and certifying that there are comprised in those copies the whole of the terms of those agreements and the names of all the persons who are parties to them at the date of the certificate (including, in the case of an agreement to be made by a trade association, all persons who are members of the association or are represented thereon by such members).

Thirdly, (*i*) in so far as the terms of any agreement are comprised in one or more instruments in writing, each of those instruments (including, in relation to an agreement in which a term is implied by virtue of Explanation II of Section 35, any specific recommendation to which such term applied) is a document of which copies are required to be delivered or sent to the Registrar. If any of these instruments has been varied by some other instrument, the variation must be indicated and incorporated in the instrument concerned. (*ii*) In so far as any such variation or determination effected by any persons who are parties to it (including, in the case of agreement made by a trade association, all persons who are members of the association, or are represented thereon by such members) are not comprised in one or more instruments in writing, a memorandum in writing has to be sent or delivered to the Registrar, if such a memorandum is a document of which copies are required to be sent to him. This memorandum should set out the whole of the terms and names of all those persons.

Rule 13 : The Registrar has to enter the particulars of agreements (which are subject to registration under Chapter V) and the substance of each order made by the Commission under Section 37 in the register maintained in accordance with Form IX.

Rule 14 : Anything deliverable to the Registrar under these rules has to be addressed to the Registrar of Trade Agreements, New Delhi.

Rule 15 : The register of agreements shall be maintained at the Central Office of the Commission and at such other places as is determined by the Central Government.

The Monopolies and Restrictive Trade Practices Commission (Conditions of Service of Chairman and Members) Rules, 1970.

In exercise of the powers conferred by Section 27 of the M.R.T.P. Act, 1969, the Central Government has framed rules under the name and style as indicated above. These are summarised below.

Rule 2 : (*a*) "Act" means the M.R.T.P. Act, 1969.

(*b*) "Chairman" means the Chairman of the Commission.

(*c*) "Commission" means the M.R.T.P. Commission established under Section 5 of the Act.

(*d*) "Form" means a form specified in Schedule to these rules.

[*N.B.*; For the Forms and the Schedule, the students should refer to Sengupta's Book mentioned earlier.]

(*e*) "Judge" includes the Chief Justice, an acting Chief Justice, an Additional Judge and an acting Judge.

(*f*) "Member" means a member of the Commission.

Rule 3: A retired judge of the Supreme Court or of a High Court appointed as the Chairman or member shall be paid such salary which, together with his pension and pension equivalent of any other form of retirement benefits, does not exceed the last pay drawn by him before retirement. He shall be entitled to such allowances and other benefits as are admissible to a serving judge of the Supreme Court, as the case may be.

Where the Chairman or member retires from service as a judge of the Supreme Court or of a High Court during the term of his office of such Chairman or member, he shall be paid for the period he serves as the Chairman or member after retirement, such salary as indicated in the preceding paragraph.

If the Chairman is not a serving or a retired judge as aforesaid, then his salary shall be Rs. 3,500 per month; also he shall be entitled to draw such allowances as are admissible to a Govt. officer of the first grade.

Rule 4: A member who is neither a serving or a retired judge (as aforesaid) shall get a salary of Rs. 3,000 per mensem plus the allowances admissible to a Govt. officer of the first grade.

Rule 5: *If the Chairman or a member is a serving or retired judge* (as aforesaid), he shall get the travelling allowance under the Supreme Court Judges (Travelling Allowance) Rules, 1959, or as the case may be, the High Court Judges (Travelling Allowance) Rules, 1956, in respect of journeys undertaken by him in connection with the Commission's work, at such rates as are admissible to a judge of the Supreme Court or the High Court; otherwise he shall get the same travelling allowances as are admissible to a Govt. officer of the first grade.

Rule 6: The Chairman or member who is not a serving judge shall be eligible to such leave as is admissible to a Govt. officer under the Revised Leave Rules, 1933. But where a Govt. officer to whom the Revised Leave Rules, 1933 are not applicable is appointed as a member, he shall be eligible for the grant of leave under the rules applicable to him before such appointment.

Rule 7: A Chairman, before assuming office, has to take an oath of office and of secrecy in Forms I and II respectively before the President of India, whereas a member has to take the same oath in the same forms but before the Chairman.

Monopolies and Restrictive Trade Practices (Information) Rules, 1971.

In exercise of the powers conferred by Section 67 of the M.R.T.P. Act, 1969, read with Section 43 thereof, the Central Govt., has made the rules described as above. These rules are only two in number. The first rule deals with short title (mentioned above) and commencement (16.4.71). The remaining rule deals with information to be furnished to the Central Government. An undertaking may be called upon by a general or special order under Section 43 of the M.R.T.P. Act to furnish to the Central Government information concerning activities carried on by it, the connection between it and any other undertaking or any other information relating to its organisation, business, cost of production, conduct, trade practice or management. If the undertaking is so called upon, it shall furnish, as and when required, the information called for, annually or within such time as may be specified by the Government in the order.

If any such undertaking is called upon to furnish to the Central Government information with regard to all or any of the following matters, namely—(i) its organisation, (ii) business, (iii) cost of production, (iv) conduct, (v) trade practice or management, such information will be published in the form specified in the Schedule to these rules or in such part thereof as may be appropriate in relation to the information called for by the Government.

N.B. : For the Schedule, students should refer to Sengupta's Book mentioned earlier.

Monopolies and Restrictive Trade Practices (Classification of Goods) Rules, 1971.

In exercise of the powers conferred by Section 67 of the M.R.T.P. Act, the Central Government has made the rules described above. These rules are also only two in number. The first one pertains to the short title (mentioned above) and commencement (26.6.1971).

Under the second rule, for the purposes of Chapter III of the MRTP Act, goods shall be classified in the manner specified in the Schedule to these rules (For the Schedule, students should refer to Sengupta's Book mentioned earlier.)

For making the aforesaid classification : (i) goods falling within a group specified in the schedule, but not falling within any sub-group or items, shall be classified as goods of one description ; (ii) where any goods falling within a group, also fall within a sub-group, goods falling within that sub-group shall be classified as goods of one description; (iii) where goods falling within any sub-group, also fall within any item specified under that sub-group, goods falling within that item shall be classified as goods of one description.

Monopolies. Restrictive Trade Practices Commission Regulation, 1974.

In exercise of the powers conferred on the MRTP Commission by Sections 18 and 64 of the MRTP Act, it has made the regulations as described above.

These are outlined hereunder. But the students are advised, for detailed discussion, to refer to Appendix V of Sengupta Book (supra).

(1) Definitions : (a) "Act" means MRTP Act, 1969. (b) "Applicant" means the Registrar, and in the case of applications under Section 41 of the Act, includes 'any other person interested' (*i.e.*, including manufacturers, suppliers, wholesalers, retailers and associations of trade consumers and employees in the distribution trade having a membership of at least 25 persons).

(2) *Inspection of certified copies of the documents, papers etc.* For the purpose, a party to any proceeding has to apply to the Secretary. Thereupon, subject to Sections 17, 18 and 60, he may be allowed to inspect them or get copies thereof on payment of prescribed fees and changes. Such inspection or obtaining of copies may be granted by the Commission even to one who is not a party to the proceedings. This is allowed only in the presence of an officer. The said copies are to be certified as true copies by the Secretary, Deputy Secretary, Administrative Officer or any other authorised officer. Copying charges are @ Re. 1 for a folio of 200 words or part thereof if no typing is involved ; otherwise @ Re. 1 per folio of 100 words/figures.

(3) *Reports of the Commission* : These are to be signed by the members of the Commission, or as the case may be, the Bench. The majority view prevails. The dissentient member may record his reason separately. Every report to the Central Government shall be sent to it under the *Signature of the Secretary.*

(4) *Service of notice or other documents* : It may be carried out through registered post addressed to the party or his authorised agent either at a given address (if any) or at the place of his residence or business or work for gain. Every notice or other document required to be filed with the Secretary has to be sent to him by registered post at the Commission's Office. A purported acknowledgment by the party or the refusal to take delivery endorsed by a postal employee will be regarded by the Commission as the proof of service. In the case of a trade association, service may be done to the secretary; manager or the officer of the association. Notice or other documents to be served on the Central Government or the State Governments shall be addressed to the Secretary of the appropriate Ministry or department in the manner stated above.

Duties and functions of the Director of Investigation :

(1) *Investigation and report* : On being compulsorily directed by the Commission under Section 10(a)(i), the Director of Investigation (D.I.) has to enquire into the complaint and report thereon. If the Commission orders a preliminary investigation which it may under Section 10(a) and (b), the D.I. has to carry it out, complete it and submit a report in 5 copies within the time the Commission may fix. But the time so fixed may be extended by it from time to time at the D.I.'s

request. The DI's reports and any other material or evidence, being confidential in nature, cannot be disclosed by him to any party ; but once these are brought on record at any stage of the enquiry at the Commission's discretion, it may make the disclosure to the parties concerned so as to afford them an opportunity to rebut the material so brought on record. However, on such rebuttal, the D.I. has the right of reply.

(2) *Action on the report of the D.I.* : Such action obviously lies with the Commission. The action may be : (a) To drop the proceedings, if there be no *prima facie* case for holding an enquiry. But before taking this decision, the complainant or the authority making the reference or application must be heard ; (b) To direct the D.I. to make such further enquiry as it thinks necessary and submit a further report ; (c) To order for an enquiry to be held, into a restrictive trade practice, if thought necessary on consideration of the D.I.'s report or further report or both. Such enquiry will be in accordance with the procedure prescribed in Chapter IX of these Regulations relating to proceedings under Section 37 of the Act.

Duties and functions of the Registrar of Restrictive Trade Agreements :

(1) The Registrar shall : (a) maintain a register for the purpose in the prescribed form ; (b) enter therein the details of all agreements requiring registration under Section 33 ; (c) maintain a special section of the register under Section 36(2) of the Act ; (d) maintain an alphabetical index of the names of all the parties to all the agreements, excepting those meant for record in the special section of the register, according to the goods or services covered by them according to the National Industrial Classification.

(2) On an application being made under Section 36(3) of the Act, the Registrar has to submit the application with 3 additional copies thereof and obtain orders from the Commission except in a case, where the disposes of it in conformity with the general directions issued by the Commission. In this excepted case, however, he has to give the applicant an opportunity to represent his case. The Registrar can, if he thinks necessary, apply to the Commission seeking its special directions, this application must contain information and be accompanied by certain documents and papers.

Enquiries and Investigations by Officers of the Commission :

Without prejudice to what has been stated earlier under the head "Duties and function of the D.I.", the Commission may ask the D.I. or any one or more of its officers to study and investigate, and report or furnish information on any trade practices—monopolistic or restrictive. The reports or information thus furnished, being confidential in character, cannot be disclosed by any one of them to any party.

Procedure for reference under Chapters III and IV of the Act by the Government.

(1) On the receipt of a reference from the Central Government under Sections 21, 22, 23, 27 and 31, the Commission may publish short particulars thereof

in newspapers and periodicals of the Commission's choice, inviting comments regarding the proposal within the time mentioned in the notification. The comments must be in quadruplicate and the commentator shall state whether he would like to participate in the public hearing before the Commission.

(2) In the case of a reference under Section 27, the Commission shall, after requisite investigation, formulate its tentative opinion a copy of which has thereafter to be sent to the concerned undertaking(s) together with a copy of the reference. Thereupon, within the time fixed by the Commission, the concerned undertaking(s) may file a statement of its objections to and/or suggestions about the tentative opinion.

(3) In the case of a reference under Section 31, the Commission must furnish to the concerned undertakings the substance of the reference and permit such undertakings to submit their written statement in quadruplicate within 14 days of the receipt of the notice.

(4) The Commissioner may : (*a*) address letters to the applicant, concerned Government departments and parties calling for particulars and information (replies thereto to be sent in quadruplicate) ; (*b*) call them for discussions considered necessary for the enquiry ; (*c*) visit personally, or through a deputee, their places and hold discussion with their representatives, if considered useful for the enquiry.

(5) The applicant, concerned undertaking, the sender of comments expressing the desire to participate in the abovementioned public examination and any other persons determined by the Commission must be intimated about the date of the public hearing at least 21 days before such date. And the sender of comments as aforesaid must file with the Commission at least 10 days before the date of public hearing a statement containing the submissions.

(6) In respect of these enquiries, the Central Government has the right to be represented.

Minimum Re-sale Price Maintenance

(Exemption) Applications

(1) The Registrar or any other interested person wishing to make a reference to the Commission under Section 41 for exemption from the operation of Sections 39 and 40 must make an application in writing clearly stating the matters mentioned in regulation 39 of the MRTP Commission Regulations, 1974. This application has to be supported by evidence regarding facts mentioned therein and verified in the manner prescribed in regulation 57 (Chapter IX) of these Regulations, *i.e.*, in the manner prescribed by the Code of Civil Procedure in respect of pleadings. A joint application is permissible if one or more persons deal with similar class of goods for which exemption is sought. A common application can be made for a number of classes of goods appearing to be closely related ; but if such classes of goods are not closely related, a separate application for each class is needed.

(2) If the Secretary thinks that there is no *prima facie* substance in the said application, he may place it before the Commission for preliminary hearing and inform the applicant of the hearing date. After hearing the applicant, the Commission may reject the application *in limine* (*i.e.* on the threshold). As regards the applications not rejected *in limine*, the Secretary must give notice to all concerned parties and also publish it in newspaper(s). The relevant matters including the class or classes of goods and the names and addresses of the applicants are to be stated in the said notice. A copy of this notice has also to be sent by the secretary to the Ministry or Department dealing with the subject-matter of the application, inviting its comments. Representations opposing or supporting the maintenance of minimum resale price must be filed before the Commission within 30 days of the newspaper-publication of the notice. Such representations must comply with the other requirements of Regulation 65 (relating to appearance of parties) and shall be verified in the manner prescribed by Regulation 57.

After the expiry of the aforesaid period of 30 days, the Commission shall fix the date for preliminary hearing. This hearing being done and the representation, etc., received being taken into account, the Commission may refer the matter to the or any other officer of it for investigation and in respect of application field by the D.I. Registrar, to him if he is chosen by the Commission to conduct the investigation. Thereupon, he shall make the report containing the findings to the Commission within 90 days of the direction for investigation.

After the receipt of the aforementioned investigation report and the consideration of the submission of the parties during the course of preliminary hearing, the Commission : (*a*) shall determine the persons to be permitted to participate or to be represented in the proceedings before it ; (*b*) may order that some or all of the persons filing the representations are to be represented by a common representative to be chosen by the Commission ; (*c*) may direct for the amendment of that reference ; (*d*) may give such other directions as it may think fit (Regulation 48.)

(3) Final hearing regarding the references, mentioned in the preceding paragraphs, shall be held in accordance with Regulation 81.

Proceedings under Section 37 of the Act (Chapter IX, MRTP Commission Regulations, 1974)

(1) Such proceedings must be initiated by a notice to the person or persons against whom allegations of restrictive trade practices are made. This notice must state that the Commission proposes to hold an enquiry into the alleged trade practices. The notice shall bear the Commission's seal and be signed by the Secretary. The Commission shall cause a copy of the notice to be served on such parties as it may decide and such out of those parties, as the Commission may direct, shall be respondents to the proceedings.

(2) Every respondent wishing to be heard in the proceedings must within 14 days of the service upon him of the copy of the notice of enquiry, *enter an*

appearance in the Commission's office by delivering to the Secretary 6 copies of a memorandum stating that the respondent wishes to be heard in the proceedings. The memorandum must contain the name of his duly authorised advocate having an office in Delhi or New Delhi. The Secretary shall send one copy of the memorandum to the Registrar in cases where proceedings are initiated under Section 10(*a*)(*iii*), and in all other cases to the D.I.

(3) Every respondent who has entered an appearance shall, within 4 weeks of his entering appearance, deliver to the Secretary a reply to the notice in 5 copies. The reply shall include particulars of each of the provisions of Section 38 on which he intends to rely and particulars of the facts and matters alleged by him, to entitle him to rely on such provisions. The documents relied upon by the respondent should be listed and the list annexed to the reply. The Secretary shall furnish a copy of this reply to the Registrar in cases initiated under Section 10(*a*)(*iii*), and in all other cases to the D.I. Then the Registrar or D.I. shall file with the Secretary, a "rejoinder" with 5 additional copies thereof within 6 weeks after the expiry of the time limited for the delivery of a reply by the respondent. No pleading subsequent to the "rejoinder" shall be presented except by the leave of the Commission. The Commission may, on the application of any party, strike out the whole or any part of the said reply, rejoinder, pleading or supplemental pleading which appears to the Commission to be frivolous, vexatious or irrelevant ; in that event, the Commission may allow further time for the delivery of the reply, rejoinder, etc.

(4) Amendment of notice of enquiry and pleadings may be permitted by the Commission.

(5) The final hearing will take place in open court. But the Commission has the authority to hold it *in camera* ; this is compulsory in certain cases, *e.g.*, when public interest is involved or where evidence may be given as to secret processes of manufacture or, as to the presence, absence or situation of any mineral or other deposits or as to any similar matter the publication of which is likely to damage substantially the legitimate business interests of any person. In any other case in which it appears proper to the Commission, it may order the hearing to be held *in camera*.

Suppose, on the hearing of the said application, the Commission feels that the provisions of the agreement or any other fact or circumstances relating to the agreement or trade practice (s) are substantially similar to those already considered in previous proceedings before the Commission. In such a case, it may direct that the issue be referred for determination in a summary way. Having given this direction, unless the case differs from the one previously considered, the Commission may determine, at the hearing, the issue in a summary way without hearing evidence in any form and give, by order, any direction which it could have given under Section 37 of the MRTP Act.

Provisions of Foreign Exchange Regulation Act and its Evaluation

The need to regulate and control foreign exchange to conserve scarce foreign exchange and to prevent malpractices and transactions was felt during World War II and certain rules were framed in this behalf under the Defence of India Act. Subsequently, the Foreign Exchange Regulation Act was enacted in 1947 as a temporary measure imposing restrictions on dealings in foreign exchange, on import and export of currency and bullion, payment for goods exported, etc. The Act empowered the Reserve Bank and the Central Government to ensure the proper accounting and realisation of foreign exchange earned by exports or otherwise. The Act was permanently put on the statute book in 1957 and was amended from time to time till it was repealed and replaced by the Foreign Exchange Regulations Act, 1973 (popularly known as FERA). This Act came into force from January, 1974.

The New Act contains 81 Sections. 57 Sections were adopted from the old Act with minor modifications ; 10 Sections relate to procedural matters of offences and penalties, while the remaining 14 Sections represent major departure from the earlier Act. The major features of the new Act are as follows :

1. It defines clearly certain cencepts which were very vague in the earlier Act. [For these, students are advised to refer to I.S.P. (N) ML 12 relating, *inter alia*, to FERA as well as to the bare Act.]

2. The Central Government has been empowered to regulate and control the entry of foreign capital into India in the form of opening of branches and concerns in India by 'non resident interests' (to be defined below).

3. Specific permission is to be obtained by foreign controlled concerns to act as agents in trading and commercial activities in India or as technical and management consultants or to engage in other business activities.

4. Power has been conferred on the Central Government to control the acquisition and holding of foreign exchange in any form and payment in foreign exchange in any form.

5. The Central Government has been empowered to direct owners of foreign exchange, foreign securities or immovable properties held outside India to submit returns to the Reserve Bank and to require any person to furnish any information, book or other documents in his possession.

6. Various provisions of the Act empower both the Central Government and the Reserve Bank to issue notifications and make rules for effective implementation of the Act.

7. The Act makes the Reserve Bank of India the primary agency for administering the various provisions and guidelines issued thereunder.

8. The applicability of the several provisions of the Act depends upon the resident status of the person or company concerned.

The Act describes the non-resident interests as :

(*a*) Persons resident outside India (whether citizens of India or not).

(*b*) Persons who are not citizens of India but who are residents in India.

(*c*) Companies (other than banking companies) incorporated abroad and their branches.

(*d*) Companies incorporated in India in which the non-resident interest (foreien holding) is more than 40%.

N.B. Students are expected to read the provisions of F.E.R.A. from the bare Act.

Impact of the Act on Foreign Investment in India :

Many developing countries, including India, are deficient in capital and sophisticated technical know-how in certain fields. Hence they look for foreign capital and technology and encourage financial and technical collaboration between indigenous and foreign entrepreneurs in selected industrial development projects. The policy of the Government of India in regard to inflow of foreign capital investment and technology in India has been pragmatic right from 1947. Over the years, several industrial and commercial enterprises with varying shares of foreign holdings have been established in India. They are operating in a wide range of activities including consumer goods industries, capital goods industries, export-oriented industries, import substitution industries, high technology as well as low technology industries from biscuits to computers and from matches to machines.

While foreign collaboration and participation in our industrial development projects are welcome, they are subject to a series of regulations in the public interest. FERA is one such instrument of regulation. The Government's basic policy continues to be pragmatic. It is clearly stated that except in certain priority and predominantly export-oriented industrial sectors, the major share of ownership and control in foreign ventures should normally vest in Indian hands. Further, the foreign private capital should be responsive to the general industrial priorities of the Government of India and to the philosophy laid down in various five-year plans.

Under the Act, all non-resident branches of foreign companies operating in India and Indian companies having more than 40% of non-resident shareholding are required to obtain special or general permission from the Reserve Bank of India for purposes of:

(*a*) Carrying on in India of any activity, whether new or existing, of an industrial, trading or commercial nature (Section 29).

(*b*) Opening of new branches, offices or other places of business by foreign companies (Section 29).

(*c*) Acquisition of the whole or any undertaking in India carrying on any trade, commercial or industrial activity (Section 29).

(*d*) Purchase of shares of Indian companies (Section 29).

(*e*) Acting or accepting appointment as agent in India or any person or company in trading or commercial transactions (Section 28).

(*f*) Acting or accepting appointment, as technical or management advisor in India of any person or company (Section 28).

(*g*) Permitting any trade-mark to be used by any such person or company for any direct or indirect consideration (Section 28).

(*h*) Acquirring, holding, transferring or disposing of immovable property (Section 31).

(*i*) Borrowing moneys or accepting deposits (Section 26).

The Reserve Bank is entitled to exempt certain companies and persons from complying with the above requirements, based on the nature of activities carried on by them and also based on the fact that such activity was being carried on with prior permission of the Government.

The Reserve Bank is empowered to handle cases of companies having more than 40% of foreign holdings and branches of foreign companies if such companies and branches are engaged in any of the following activities :

1. Manufacture of products in the priority industrial sector specified in Appendix I of Industrial Licencing policy of 1973.
2. Manufacture of products requiring sopohisticated technology not available indigenously.
3. Trading and construction activities as also technical engineering services consultancy requiring specialised skills not available indigenously.
4. Manufacture of products meant predominantly for export. At least 60% of the total production should be exported.
5. Tea plantations which are significantly export-oriented.

The Reserve Bank is competent to handle the above cases of companies within the framework of the guidelines issued by the Central Government from time to time, It need not refer such cases to the Government.

The relvant guidelines issued by the Government in regard to the above companies are as follows :

(*a*) In case of companies or branches engaged exclusively in one of the above-mentioned activities, the Reserve Bank may allow such companies to continue, provided they decrease their foreign shareholding to 74% within a specified period.

(*b*) In the case a company or branch enaged in activities, cited above together with other activities not specified above such a company or branch may be allowed to continue if the outside activities constitute only a minor part of the total activities (not exceeding 25% of the ex-factory value of the annual production or Rs. 5 crores. whichever is less), provided the company brings down its foreign holding to 74%.

(*c*) If the activities of a company under Appendix 1 industries combined with activities requiring sophisticated technology and exports account for not less than 75% of the total annual turnover, such a company may be allowed to continue subject to the condition that it will bring down the foreign equity holding to 74% within a specified period.

(*d*) If the activities of a company under Appendix I industries combined with activities requring sophisticated technology and exports account for not less than 60% of the total annual turnover, such a company may be allowed to continue subject to the condition that it will bring down the foreign equity holding to 51% within a specified period. Another condition is that the company concerned should undertake to export a minimum of 10% of the total annual turnover within a period of 2 years from the date of approval by the R.B.I.

(*e*) If the exports of a company constitute more than 40% of its annual turnover, it will be allowed to continue its activities subject to the condition that it will bring down its foreign equity to 51%. Also companies coming forward with proposals for substantial exports will be considered for higher than 51% of the foreign shareholding, on merit.

(*f*) In the case of a trading company or branches engaged in internal trading, which has developed expertise or skill in trading, not indigenously available, and which contributes significantly to exports, R.B.I. may allow it to continue its activities subject to the condition that it will bring down the foreign equity to 74%. Alternatively, it will be asked to change its character from predominantly trading to predominantly manufacturing activities in the priority sector mentioned above or predominantly export-oriented industries. If they are reluctant to do so they will be asked to wind up their business in India. (I.B.M. has fallen in this category. It was asked to wind up its business in India).

(*g*) In the case of a manufacturing company also engaged in trading of products not manufactured by it, it will be allowed to continue subject to the condition that it will bring down the foreign equity holding to 74%. The products in which the company trades should belong to the essential or associated category and should be functionally related to the products manufactured by the company. In no case should the share of such traded products constitute more than 25% of the *ex-factory* value of the annual production or Rs. 5 crores, whichever is less.

(*h*) In the case of 100% export-oriented manufacturing unit, the ceiling of foreign equity participation of 74% may be raised on merits of each case.

Explanatory Note :

(i) The limit of Rs. 5 crores mentioned at (*b*) and (*g*) above will be applicable only to the trading activities of the multi-activity companies.

(ii) In all cases, branches of foreign companies should convert themselves into Indian companies.

(iii) The above guidelines will not be applicable to the drug industry.

The Reserve Bank has granted general exemption from provision of Section 29(2) to such categories of companies which have been granted licences after February, 1970 under the Industries (Development and Regulation) Act, and which are engaged exclusively in the production of products in the priority sector and which are predominantly (at least 60% of total annual turnover) export-oriented ; such exemption is granted because the companies, which are licenced after February 1970, were supposed to have fulfilled the provision of Section 29(2). The companies so exempted are required to file a declaration with the R.B.I.

All other cases of foreign companies or branches will be referred by the R.B.I. either to the Ministry of Industry and Civil Supplies or the Department of Economic Affairs in the Ministry of Finance. A high level F.E.R A. Committee has been constituted to which all cases other than those dealt with by R.B.I. are referred for consideration. All these cases will be considered by the F.E.R.A. Committee, on the basis of guidelines issued by the Government in 1973. In respect of these companies, the guidelines are as follows :

(*a*) Indian companies having more than 40% of the foreign equity holding or branches of foreign companies engaged in manufacture and trading, construction, plantation, technical and non-technical consultancy, and other miscellaneous activities are required to reduce the foreign equity holding to 40%.

(*b*) Branches of foreign companies are required to convert themselves within a specified period into Indian companies with foreign shareholding not exceeding 40%.

(*c*) Alternatively, they will be permitted to switch over from existing manufacturing activities to activities stated earlier (priority industry, predominantly export-oriented, sophisticated technology and expertise, etc.). They would have to obtain the requisite industrial licence and other Government approvals in the normal way within the frame-work laid down by Government from time to time.

(*d*) Functioning of Branches of foreign air and shipping companies operating in India will be decided on reciprocity basis.

In all the above cases of foreign companies or branches, it is open to the R.B.I. or the Government, as the case may be, to refuse permission to carry on their existing activities or to engage in new activities. However, since refusal is a serious matter, statutory right is conferred on the companies to make representation before permission is refused to them. In case permission is refused the concerned non-resident persons or companies shall discontinue their activities on the expiry of a period of 90 days, or such other later date as may be specified by the R.B.I. Failure to seek permission by means of an application will also attract the same closure notice.

The other provisions of the Foreign Exchange Regulation Act, 1973, in regard to non-resident business interests are as follows :

1. The non-resident interests (defined earlier) cannot establish a branch, office or place of business in India without the express permission of the Reserve Bank of India. Permission is also necessary for continuing the already established place of business. In case, however, permission of the Government is already obtained earlier in persuance of a licence or otherwise, no fresh permission is necessary. The power to grant exemption is vested in the R.B.I.

2. Non-resident interests are precluded from acquiring the whole or any part of any undertaking in India without obtaining general or special permission of the Reserve Bank.

3. Non-resident interests should seek specific approval of the Reserve Bank to continue to hold shares in their Indian subsidiaries ; their Indian subsidiaries should also seek the R.B.I 's approval to continue to hold shares or to acquire shares in other Indian companies.

4. Non-resident interests should get permission from the R.B.I. in regard to their existing agency agreements or for entering into new agency agreements for trading and commercial transactions with any Indian

interests. The term 'agent' is defined to include any person or company who buys any goods for resale purposes without further processing. Separate applications should be submitted for each agency agreement. Full details of the Agency agreements should be furnished to the R.B.I. Justification for continuing the existing agreements or for making modification and for new agreements should also be furnished to the R.B.I.

5. Non-resident interests should obtain permission of the R.B.I. for continuing existing appointments or accepting new appointments as technical engineering or management advisers in India to any person or company. The nature of the advice and consultancy is to be specified clearly together with full justification thereof.

6. Non-resident interests should obtain permission of the R.B.I. for continuing the existing arrangement and/or for new arrangements to permit use of their trade marks or by other persons or companies for any direct monetary or indirect consideration.

7. Non-resident interests should obtain general or special permission of the R.B.I. for acquiring, holding, transferring, or disposing of by sale, mortgage, lease, gift, settlement or otherwise, any immovable property situated in India. Certain exemptions are granted in case of any acquisition or transfer of any immovable property by way of lease for a period not exceeding 5 years, (*b*) acquiring an immovable property necessary for or incidental to carrying on by such non-resident interests of any activitity permitted by the R.B.I. and (*c*) transferring any immovable property by way of security for any permitted borrowings.

8. Non-resident interests (other than a banking company) should get the R.B.I.'s permission for accepting deposits or loans from persons resident in India.

9. Remittances of profits earned in India by branches or subsidiaries of foreign concerns to their head offices abroad are subject to the prior approval of the R.B.I.

General Remarks : In regard to FERA provisions for dilution of foreign equity, the basic objective is to regulate and control the ownership and management activities of foreign companies. Considering the fact that foreign companies in general and multinational companies in particular are considered to have high potential for operating their activities in ways dangerously prejudicial to the national, economic, social and political interests of the host countries, strict vigilance and control over their activities is strongly favoured. This is apart from the basic ideological antipathies for particular classes of foreign collaborations.

While some companies have already taken or are taking steps to fulfil the requirements of FERA in regard to their activities, quite a few are still hesitant to do so and are adamant. At least one of the multi-nationals, IBM, has paid the price by winding up its activities in India. In regard to others, some sort of pressure is applied locally and internationally to modify the stand of the Covernment. Possibly, the Government of India may relent on certain matters while standing firm on other areas.

Many foreign companies are zealous about their equity holdings and hold strong views on the question of dilution of such equity through Indian participation. Possibly they think that such a measure will deprive them of their control on the companies concerned, apart from reducing the ratio of disposable surplus being enjoyed by them.

Foreign and multi-national interests wishing to invest in business ventures in India feel that FERA provisions are a major stumbling block for inflow of foreign capital into India. They contend that as it is, investment prospects in India are not attractive because of high rates of corporate taxes, low rate of profitability, limited volume of demand, excessive Government controls, irritating delays and combersome procedures at Government end, and so on. They consider that on top of all these, FERA provisions will wean away even the hard-core optimists among the prospective foreign investors.

One complaint of the existing foreign companies is that the RBI is administering the Act in an unimaginative and non-progmatic manner. Only the letter of the law is strictly followed sacrificing its basic spirit. Very little discretion is applied by the RBI even in regard to cases where discretion is due and where the RBI is empowered to apply its judgment.

At present, there is no provision for appeal to higher authority against the decisions of the RBI on refusal to grant permission to foreign companies to continue their operations in India, whatever may be the reason. Many of the provisions of FERA require proper legal interpretation which can be done only by a court of law or similar appellate body. At present the aggrieved parties depend only upon the sense of fairness of the RBI. It may be desirable to have some arrangement for appeal against the decisions of the RBI.

Under the Act, a citizen of India who stays outside India on a prolonged basis on some assignment or jobs is considered as a non-resident. If such non-residents hold some shares they form part of foreign equity. It appears that the definition of non-residents for purposes of the Act is rather unduly stringent.

Neither the Act nor the guidelines seem to have clearly defined the terms like industrial activity, commercial activity and trading activity. This is left to be interpreted by the RBI. Perhaps, managements would have been better judges than the RBI in interpreting their own business as industrial, commercial or trading activities.

The stipulation to dilute the foreign equity holdings to 40% in non-priority industries and other mentioned above, will have the effect of loss of effective control in some corporate matters by the foreign ownership interests. It may be recalled that certain vital corporate matters should be cleared through a special resolution passed by a majority of not less than 75% of votes cast in the annual general meetings of shareholders. This means that the foreign controlling interests will have to surrender much of their hold over their Indian subsidiaries once the shareholdings are diluted.

FERA provisions and the new Government's attitude towards foreign capital raises several important questions. These are listed below :

1. In view of the basic reorientation of the economic and industrial policy of the new Government and its revised priorities, how far is the priority sector specified by the earlier Government in 1973 valid ? If priorities are in fact revised, what will be the impact of such change on the foreign companies already engaged in such sectors at the moment ?

2. A close look at the list of products specified in the priority sector (Appendix 1 of Industrial Licencing Policy of 1973) reveals that quite a few of them have ceased to be qualified as priority sector products in view of the present realities. For example, what is the status of automobile tyres and tubes industry now ?

3. Is there not an inconsistency in the policies and intentions of the Government in allowing higher foreign equity and thus greater foreign equity and thus greater foreign control in priority sector industry, export-based and high technology industries and so on where in fact control should vest in Indian hands in view of their criticality for our national interests ?

4. Presumably, industries in the priority sector, export based, high technology and similar industries where more than 40% foreign equity is allowed, are more profitable and may lead to a larger drainage of foreign exchange in the form of royalties, dividends and other payments. Is it in our national interest to allow foreign companies to enjoy a bigger share of the more remunerative sector ?

5. It is a common knowledge that investible funds in India are very scarce and are to be used with great discretion. By allowing foreign companies to dilute their equity with Indian equity participation, the Government is diverting scarce Indian investible funds from purely Indian ventures to lighten the equity burden of foreign interests. In a sense, it amounts to relative foreign divestment as against our objective to properly encourage foreign investment. In many cases the requirement of dilution of foreign equity need not necessarily lead to diminition of foreign control over their Indian subsidiaries.

Restrictions on establishment of place of business in India by a foreign company: Section 29 of the Foreign Exchange Regulation Act, 1973 imposes certain restrictions on establishment of place of business in India by a company, not being a banking company, which is not incorporated under any law in force in India. Such company shall not, except with the general or special permission of the Reserve Bank of India :

(1) carry on in India any activity of a trading, commercial or industrial nature other than the activity for the carrying on of which permission of the R.B.I. under Sec. 28 has been obtained ;

(2) establish in India branch office or other place of business for carrying on any activity of a trading, commercial or industrial nature except the activity covered under Sec. 28 for which permission of the R.B.I. has been obtained ;

(3) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry ; and

(4) purchase shares in India of any company referred to in (3) above.

Even in the case of existing, trading commercial or industrial activities carried on or set up in India by such a company at the commencement of the Act, permission of the Reserve Bank would be necessary for continuance of existing business. For this purpose, an application in the prescribed form has to be made to the Reserve Bank within six months from such commencement or such further period as the R. B. I. may allow for permission to continue to carry on such activity or to continue the establishment of the branch, office or other place of business for the carrying on of such activity, as the case may be. On receiving such application, the Reserve Bank may, after making such enquiry as is deemed necessary, allow the application subject to such conditions as the R.B.I. thinks necessary to impose. Such application may also be rejected by the R.B.I. after giving an opportunity to make representation in the matter. If the application is rejected, the company shall discontinue its activity or close down the branch office, etc. on the expiry of ninety days, or such other later date as may be specified by the R.B.I., from the date of receipt of the communication conveying such rejection.

In case such company (including branch) fails to make any application for the required permission, then the R.B.I. may direct such company (including branch) to discontinue such activity or to close down the branch, etc., on the expiry of such period as may be specified in the direction. An opportunity to make representation would, however, be allowed to the party which may be affected by such direction, before the R.B.I. passes the order.

However, a company carrying on trading, commercial or industrial activity at the commencement of the Act in pursuance of any permission or licence granted

by the Central Govt. may be exempted from this provision of obtaining R.B.I.'s permission for continuance of its activities and establishments. Such exemption may be granted by the R.B.I. but it is not available if the company is carrying on solely an activity of trading nature.

Similar permission is also necessary for continuance of existing shareholding in India by such company ; the R.B.I. may allow such company to hold the shares subject to such conditions as may be imposed or direct such company to sell or procure the sale of such shares.

In addition to a company which is not incorporated in India, these restrictions also apply to :

(*a*) a person resident outside India, whether a citizen of India or not ;

(*b*) a person who is not a citizen of India but is resident in India ;

(*c*) a company (other than a banking company) in which non-resident interest is more than 40% ; and

(*d*) any branch of such company mentioned in (*c*) and a company which is not incorporated under any law in force in India.

Restrictions on persons resident in India associating themselves with concern outside India : Section 19 (1) (*e*) of the Foreign Exchange Regulation Act, 1973 lays down that, notwithstanding anything contained in Section 81 of the Companies Act, no person can, except with the general or special permission of the Reserve Bank acquire, hold or dispose of any foreign security. Under Section 27 of the FERA, without prejudice to the above restriction, no person resident in India can, without the previous permission of the Central Government, in any wise associate himself or participate in any concern outside India engaged in, or intending to engage in, any activity of a trading, commercial or industrial nature whether or not such concern is a body corporate. According the Explanation to Section 27, a person who is merely an employee of the concern outside India shall not by reason of such employment only be deemed to be associating himself with or participating in such concern.

The aforesaid previous permission of the Central Govt. has to be sought through an application in such form, in such manner and containing such particulars as may be prescribed. The Central Govt., while allowing the application, may impose any conditions. This permission must also be subject to the condition that the person to whom such permission has been granted shall comply with such requirement as the Reserve Bank may, from time to time, direct. If such a person does not comply with either the Central Govt's condition or the Reserve Bank's direction then without prejudice to any other action that may be taken against him under the FERA, the Central Govt. may by order revoke the permission so granted, but not before giving the affected person a reasonable opportunity for making a representation in this behalf.

As regards the restrictions pertaining to assets held by non-residents, Section 11 provides that the Reserve Bank may, if it considers it necessary or expedient in the public interest to do so, impose a condition that the said asset shall not be transferred, assigned, pledged, charged or dealt with in any manner whatsoever except in accordance with general or special permission which may be granted conditionally or otherwise by the Reserve Bank.

Section 19 imposes restrictions on export of securities to persons resident outside India with a view to preventing the flight of capital from India, to see that the payment for the securities is received from the purchases in India and that the securities are not transferred to acquire foreign exchange contrary to the provisions of the Act. These restrictions are also intended to control investment of the foreign exchange in the country. Without the general or special permission of the Reserve Bank, a person cannot do the following things, namely—(*a*) take or send any security to any place outside India ; (*b*) transfer any security, or create or transfer any interest in security, to or in favour of a person resident outside India ; (*c*) transfer any security from a register in India to a register outside India or do any act which is calculated to secure, or forms part of a series of acts which together are calculated to secure, the substitution for any security which either in India or registered in India, of any security which is either outside, or registered outside, India; (*d*) issue, whether in India or elsewhere, any security which is registered in India or to be registered in India, to a person resident outside India; (*e*) acquire, hold or dispose of any foreign security.

Despite anything contained in any other law, no transfer of any share of a company registered in India made by a person resident outside India or by a national of a foreign State to another person whether resident in India or outside India shall be valid, unless such transfer is confirmed by the RBI on an application made to it in this behalf by the transferor or the transferee (sub-section (5)]. If the Central Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, through a Gazette notification, exempt any such transfer or class of such transfers from the operation of the provisions of sub-section (5), subject to such conditions, if any, as may be specified in the notification [sub-section (6)].

Section 19(2) deals with a nominee holder of security (*i e.*, one holding the security not in his own right but in the right of someone else who in fact has the right to control the acts of the nominee with regard to the disposition of the security). Except with the general or special permission of the Reserve Bank, such a nominee cannot do any act by which he recognises or gives effect to the substitution of another person as the person from whom he directly receives instructions, unless both the persons, *i.e.*, the person previously instructing the substitution and the person substituted, immediately before the substitution resident in India.

By way of protection against the evasion of Section 19, the Reserve Bank has the power to require that the transferor of any security and the transferee thereof shall subscribe to a declaration that the transferee is not resident outside India.

Under Section 31, the following entities cannot, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India. These entities are : (*i*) a person who is not a citizen of India ; (*ii*) a company (other than a banking company) which is not incorporated under any law in force in India ; (*iii*) a company in which the non-resident interest is more than 40%. These entities may, however, apply for such permission of the Reserve Bank for the above purposes. Such application, after due enquiry by the Reserve Bank, may be granted or refused ; if it is not refused within 90 days (excluding the time compulsorily to be given for making the representation) of its receipt, permission would be presumed to have been granted.

NB : For a discussion of Sections 1 to 22 of the Foreign Exchange Regulation Act, 1973, you are advised to read the relevant partions from I.S.P. (N) ML 12 which is already in your possession.

THE INDUSTRIES (DEVELOPMENT AND REGULATION) ACT, 1951

Inoduction : This Act was brought into existence in order to implement various objectives of the Industrial Policy Resolution of 1948 which envisaged that private enterprise, while continuing to play an important role, would be properly directed and regulated. The Act is important piece of Legislation in the sense that it provides for development and regulation of certain industries specified in the First Schedule to the Act. A cursory glance to this Schedule will reveal that the industries are broadly classified into different categories, namely—metallurgical fuels, boilers and steam generating plants, prime-movers other than electrical generators, electrical equipment, telecommunication, transportation, industrial machinery, machine tools, agricultural machinery, earth moving machinery, miscellaneous, mechanical and engineering industries, commercial, office and household equiqment, medical and surgical appliances, industrial instruments, scientific instruments, surveying and drawing instruments fertilizers, chemicals other than fertilizers, photographic raw film and paper, dye-stuffs, druge and pharmaceuticals, textiles including those dyed, printed or otherwise processed, paper and pulp including paper products, sugar fermentation industries food processing industries, vegetable oils and vanaspati, soaps, cosmetics and toilet preparations, rubber goods, leather and leather goods and picker, glue and gelatin, glass ceramics, cements and gypsum products, timber products, defence industries and cigarettes.

For the purpose of the implementatation of the Industrial Policy Resolutions the Central Government has been empowered to do the following things, namely- (1) Setting up of Central Advisory Council to advise the Central Government on matters relating to the development and regulation of the aforesaid class of industries; (2) Setting up of Development Councils—one for each scheduled industries —to act as some kind of industrial planning and development organisations; (3) Imposition of cess on scheduled industries in certain cases; (4) Getting each existing industrial undertaking registered in a prescribed manner; (5) Granting or refusing of a licence or permission for starting new industrial undertaking, for manufacturing

new article or for effecting any substantial expansion or for changing the location of the whole or any part of the undertaking; (6) Investigation of the affairs of any scheduled industrial undertaking and issuing of direction on the completion of such investigation; (7) Taking over of the management or control of an industrial undertaking which is being managed in a manner, detrimental either to the scheduled industries or to public interest; (8) Controlling, supplying, distributing, pricing, etc., of certain articles in order to secure equitable distribution and availability at fair prices of any article relatable to any scheduled industry; (9) Authorising a person to enter and inspect premisesr to order the production of any documents, books, register or record in the possession or power of any person having the control of or employed in connection with any industrial undertaking and to examine any person having the control of or employed in any industrial undertaking; (10) Imposition of penalty for actual contravention or attempted contravention or for abetting contravention of the various provisions of this Act any direction issued or any order made; and (11) Framing rules to carry out the purposes of the Act.

The above-mentioned Act came into force on 8-5-52. It extends to the whole of India.

REGULATION OF SCHEDULED INDUSTRIES :

(*a*) *Registration of existing industrial undertaking* (*Section 10*) : The owner of every existing industrial undertaking, not being the Central Government, must, within such period as the Central Government may, by the notification in the Official Gazette, fix in this behalf with respect to industrial undertakings generally, or with respect to any class of them, register the undertaking in the prescribed manner. The Central Government must also cause to be registered in the same manner every existing industrial undertaking of which it is the owner.

Once the industrial undertaking is so registered, the owner of the undertaking or where the Central Government is the owner thereof, then the Central Government must be issued with a certificate of registration containing such particulars as may be prescribed.

(*b*) *Revocation of registration in certain cases* (*Section 10A*) : The Central Government may, after giving an opportunity to the owner of the undertaking to be heard, revoke the registration, if it is satisfied about the following matters : (1) that the registration of any industrial undertaking has been obtained by misrepresentation as to an essential fact ; or (2) that any industrial undertaking has ceased to be registrable under this Act by reason of any exemption granted under this Act ; or (3) that any other reason, the registration has become useless or ineffective and therefore requires to be revoked.

Licencing of new industrial undertakings (*Section 11*) : After the commencement of this Act, no person or authority other than the Central Government shall establish any new industrial undertaking, except under and in accordance with the licence issued in that behalf by the Central Government. It has also been provided that a State Government other than the Central Government may, with the previous permission of the Central Government, establish a new industrial undertaking. The

aforesaid licence or permission may contain such conditions including, in particular, conditions as to the location of the undertaking and the minimum standards in respect of size to be provided therein as the Central Government may deem fit to impose in accordance with the rules, if any, made under Section 30.

Licence for producing or manufacturing new articles (Section 11A): The owner of an industrial undertaking, not being the Central Government, which is registered under Section 10 or in respect of which a licence or permission has been issued under Section 11, must not produce or manufacture any new article unless it fulfills the following two conditions, viz., (a) in the case of industrial undertaking registered under Section 10, he has obtained a licence for producing or manufacturing such new article and (b) in the case of an industrial undertaking in respect of which a licence or permission has been obtained under Section 11, he has had the existing licence or permission amended in the prescribed manner.

Revocation and amendment of licence in certain cases (Section 12): Before the Central Government may revoke the licence, it must be satisfied, either on a reference made to it in this behalf or otherwise, that any person or authority, to whom or to which a licence has been issued under Section 11, has without reasonable cause, failed to establish or to take effective steps to establish the new industrial undertaking in respect of which the licence has been issued within the time specified therefor or within such extended time as the Central Government may think fit to grant in any case. Thus, the satisfaction or opinion of the Central Government that the person or authority has, without reasonable cause, failed to establish is a condition precedent to the passing of a valid order of revocation.

Subject to any rules that may be made in this behalf, the Central Government may also vary or amend any licence issued under Section 11, but this power of variation or amendment must not be exercised after effective steps have been taken to establish the new industrial undertaking in accordance with the licence issued in this behalf.

The provision of the section shall apply in relation to the licence issued under Section 11A or where a licence has been amended under that section, to amendment thereof as they apply in relation to the licence issued under Section 11.

Further provision for licencing of industrial undertakings in special case: Section 13 makes the following provisions: (a) In the case of industrial undertaking which is required to be registered under Section 10 but which has not been registered within the time fixed for the purpose, the owner thereof must not carry on the business of that undertaking after the expiry of such period. (b) In the case of an industrial undertaking the registration in respect of which has been revoked under Section 10A, the owner thereof must not carry on business of the undertaking after the revocation. (c) In the case of industrial undertaking to which the provisions of the Act did not originally apply but become applicable after the commencement of this Act for any reason, the owner thereof must carry on the business of the undertaking after the expiry of three months from the date on which the provisions of this Act became so applicable. (d) The owner of an industrial undertaking must not effect any "substantial expansion" of it, which has been

registered or in respect of which a licence or permission has been issued. The expression "substantial expansion" means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking, or which is of such a nature as to amount virtually to a new industrial undertaking, but does not include any such expansion as is normal to the undertaking, having regard to its nature and the circumstances relating to such expansion. (e) The aforesaid owner must not change the location of the whole or any part of an industrial undertaking which has been registered.

The owner of the industrial undertaking must not do the things mentioned in (a) to (e) above, except under, and in accordance with, a licence issued in that behalf by the Central Government and, in the case of a State Government, except under and in accordance with the previous permission of the Central Government.

The provisions of Section 11(2) and Section 12 shall apply, as far as may be, in relation to the issue of licences or permission to any industrial undertaking referred to in Section 13 as they apply in relation to the issue of licences of permission to the new industrial undertaking.

Procedure for the grant of licence or permission (Section 14) : Before granting any licence or permission under Section 11, Section 11A, Section 13, or Section 29B, the Central Government may require such officer or authority as it may appoint for the purpose to make a full and complete investigation in respect of application received in this behalf and report to it about the result of such investigation. In making any investigation, the officer or authority must follow such procedure as may be prescribed.

Power to cause investigation to be made into scheduled industries or industrial undertakings : Section 15 empowers the Central Government to cause investigation to be made into scheduled industries or industrial undertakings under certain circumstances. The circumstances are as follows : (i) That there has been or is likely to be a substantial fall in the volume of production in respect of any article or class of article relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which having regard to the economic conditions prevailing, there is no justification ; or (ii) That there has been or is likely to be marked deterioration in the equality of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking, or undertakings, as the case may be, which could have been or can be avoided ; or (iii) That there has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification ; or (iv) That it is necessary to take any such action as is provided in this chapter relating to the regulation of scheduled industries, for the purpose of conserving and resources of national importance which are utilised in the industry or the industrial undertaking or undertakings, as the case may be.

One should note that the opinion of the Government as to existence of the circumstances enumerated from (i) to (iv) above is conclusive and is not

subject to objective test by the Court. (*Hubli Electricity Co. Ltd. v. Province of Bombay*). The relevant *matter is the opinion and not the ground on which it is based; so that the Govt. is not called upon* to place before the Court the material on which it based its opinion. It is nonetheless absolutely necessary for the requisite opinion to be specifically expressed and without a recital of that opinion the order would not be in accordance with Section 15 (*Baboo Halvai v. Mirzapur Electricity Supply Company*);

(*v*) That the Central Government is of the opinion that any industrial undertaking is being managed in a manner highly detriment to the scheduled industry concerned or to public interest.

Power of Central Government on completion of investigation under Section 15 (*Section 16*): After the investigation under Section 15, if the Central Government is satisfied that the action under Section 16 is desirable, then it may issue such directions to the industrial undertaking or undertakings concerned as may be appropriate in the circumstances for all or any of the following purposes, namely- (*a*) to regulate the production of any article or class of articles and fix the standards of production; (*b*) to take such as the Central Government may consider necessary to stimulate the development of industry to which the undertaking or undertakings relates or relate; (*c*) to prohibit the industrial undertaking or undertakings from resorting to any act or practice which might reduce its or their production, capacity or economic value; (*d*) to control the prices or to regulate the distribution of any article or class of articles which have been subject-matter of investigation:

Where a case of industrial undertaking or undertakings is under investigation, then the Central Government may issue at any time any direction of the nature aforesaid to the individual undertaking or undertakings concerned. Any such direction shall remain effective, until it is varied or revoked by the Central Government.

Power of person or body of persons appointed under Section 15 to call for assistance in any investigation (*Section 18*): The person or a body of persons to make investigation under Section 15 may choose one or more persons possessing special knowledge of any matter relating to the investigation to assist him or it in holding the investigation.

The persons or body of persons so appointed shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purpose of taking evidence on oath as also for the purpose of enforcing the attendance of witness and compelling the production of documents and material objects. The person or body of persons shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

Direct management or control of industrial undertakings by Central Government in certain cases:

(*a*) *Power of Central Government to assume management or control of an industrial undertaking in certain cases* (*Section 18A*): The Central Government may

be of the opinion that : (*i*) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions, or (*b*) an industrial undertaking in respect of which an investigation has been made under Section 15 (whether or not any directions have been issued to the undertaking in pursuance of Section 16), is being managed in a manner highly detrimental to the scheduled industry concerned or to the public interest. In either case, the Central Government may by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

The aforesaid order shall remain effective for such period not exceeding five years as may be specified in the order. However, if the Central Government is of the opinion that it is expedient in the public interest that any such notified order should continue to be effective even after the expiry of the above-mentioned period of five years, then it may from time to time issue directions for such continuance for such period not exceeding two years at a time as may be specified in the direction. But the total period of such continuance (after the expiry of the said period of five years) must not exceed 10 years. Where such direction is issued, a copy thereof must be laid, as soon as may be, before both the Houses of Parliament.

According to Section 18B, the effects of notified order under Section 18A are as follows : (*i*) All persons in charge of the management, including persons holding office as managers or directors of the industrial undertaking immediately before the issue of the notified order. must be deemed to have vacated their offices as such. (*ii*) In any contract of management between the industrial undertaking and director thereof holding office as such immediately before the issue of notified order must be deemed to have been terminated. (*iii*) The person or body of persons authorised under Section 18A to take over the management must take all necessary steps to bring into his or their custody or control all the property, effects and actionable claims to which the industrial undertaking is or appears to be entitled. All the property and the effects of the industrial undertaking must be deemed to be in the custody of the person or the body of persons as from the date of the notified order. (*iv*) The persons authorised under Section 18A to take over the management of an industrial undertaking which is a company shall be, for all intents and purposes, the directors of the industrial undertaking only constituted under the Companies Act. They shall exercise all powers of the directors of the industrial undertakings, whether such powers are derived from the Companies Act or from the memorandum or articles of association of the industrial undertaking or from any source.

Subject to the provision of this Act and to the control of the Central Government, the person or body of persons authorised to take over the management of the industrial undertaking must take all necessary steps for the purpose of efficiently managing the business thereof and exercise such other powers and have such other duty as may be prescribed.

The business of the undertaking shall be carried on pursuant to any directions given by the authorised person in accordance with the provision of the notified order.

The person or body of persons authorised under Section 18A must exercise his or their functions in accordance with such directions as may be given by the Central Government. This power may be exercised irrespective of whether there is anything contained in the memorandum or article of association of the industrial undertaking. Such an authorised person or body of persons cannot give any other person any directions which are inconsistent with the provisons of any Act or instrument determining the functions of the authority carrying on the undertaking except in so far as may be specifically provided by the notified order.

Contracts in bad faith, etc., may be cancelled or varied (Section 18C) : Without prejudice to the provision of Section 18B, the person authorised under Section 18A to take over the management of an industrial undertaking may, with the previous approval of the Central Government, apply to a Court which has the jurisdiction in this regard praying for the concellation or variation of a contract or agreement entered into between the industrial undertaking and any other person before the issue of the notified order under Section 18A. If, on the enquiry made by the Court it is satisfied that the said contract or agreement was made in bad faith and was detrimental to the interest of the undertaking, then it may make an order cancelling or varying it which would be effective accordingly. The Court may pass the said order either unconditionally or subject to such conditions as it may deem fit to impose.

No right to compensation for termination of office or contract (Section 18D): A person who ceases to hold any office by reason of the provisions of Section 18B(1)(a) or whose contract of management is terminated by reason of the provisions of Section 18B (1)(b), shall not be entitled to any compensation for the loss of office or for the premature termination of his contract of management. But this rule shall not affect his right to recover from the industrial undertaking moneys recoverable otherwise than by way of such compensation.

Application of the Companies Act (Section 18E): The management of an industrial undertaking which is a company as defined in the Companies Act, 1956 may be taken over by the Central Government. If it is so taken over then not withstanding anything contained in the Companies Act or in the memorandum or article of association of such undertaking, it shall not be lawful for the shareholders of such undertaking or any other person to nominate or appoint any person as director of the undertaking. Also, in case of such take-over, no resolution passed at any meeting of the shareholders of such undertaking shall be given effect to unless approved be the Central Government. Further, no proceedings for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any Court except with the consent of the Central Government.

The Companies Act shall continue to apply to such undertaking in the same manner as it applied thereto before the issue of the notified order under

Section 18 A. This rule is, however, subject to the provisions stated in the preceding paragraph and to the other provisions contained in the Act and subject to such other exceptions, restrictions and limitations as the Central Government may specify in this regard.

Power of the Central Government to cancel notified order under Section 18 A (Section 18F) : The Central Government may, by notified order, cancel notified order issued under Section 18A. It can do so if it appears to it, on the application of the owner of the industrial undertaking or otherwise, that the purpose of the order made under Section 18A has been fulfilled, or that for any other reason it is not necessary that the order should not remain in force.

Control of supply, distribution, price, etc.,

Power to control supply, distribution, price, etc., of certain articles (Section 18G) : So far as it appears to the Central Government to be necessary or expedient for securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry, the Central Government may provide for regulating the supply and distribution thereof and trade and commerce therein. Thus the Central Government may do so irrespective of whether there is anything contained in any other provisions of this Act by notified order.

The aforesaid notified order may provide for : (a) controlling the prices at which any article or class of articles may be brought or sold ; (*b*) regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class of articles ; (*c*) prohibiting the withholding from sale of any such article or articles ordinarily kept for sale ; (*d*) requiring any person manufacturing, producing or holding in stock any such article of class of articles to sell the whole or part of the article so manufactured or produced during a specified period or to sell the whole or a part of the article so held in stock to such person or class of persons and in such circumstances as may be specified in the order ; (*e*) regulating or prohibiting any class of commercial or financial transactions regulating to such article or class of articles which, in the opinion of the authority making the order, are or if unregulated are likely to be deterimental to public interest ; (*f*) requiring persons engaged in the distribution and trade and commerce in any such article or class of articles to mark the articles exposed or intended for sale with the sale-price or to exhibit at some easily accessible place on the premises the price-lists of articles held for sale and also to similarly exhibit on the first day of every month or at such other time as may be prescribed, a statement of the total quantities of any such articles in stock; (g) collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters ; and (*h*) any incidental or supplementary matters including in particular the grant or issue of licences, permits or other documents and the charging of fees therefor.

If the person sells any article in pursuance of any order mentioned in (*d*) in the preceding paragraph, then he must be paid by way of price therefor, where the price consistently with the controlled price, if any, can be fixed by agreement,

the price so agreed upon. If no such agreement can be reached, then he must be paid that price which is calculated with reference to the controlled price, if any, fixed paid under Section 18G. In cases other than these two, he must be paid that price which is calculated at the market rate prevailing in the locality at the date of sale.

No order made in exercise of any power conferred by Section 18G can be called in question in any Court. If an order purports to have been made and signed by an authority in exercise of any such power, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was made by that authority.

It may be noted that the expression "articles or class of articles relatable to any scheduled industy" includes articles of the same nature or description imported into India.

FORMS PRESCRIBED UNDER THE INDUSTRIES (DEVELOPMENT AND REGULATION) ACT, 1951 AND GUIDELINES FOR COMPLETION THEREOF

Applications are required to be submitted to the Central Government as under :

Sl. No.	Form No.	Rule	Section	Particulars of Application
1.	IL	7	11	Application for a license or permission for the establishment of a new industrial undertaking.
2.	IL	7	11A	Application for a license or permission for manufacture of new Articles.
3.	IL	7	13(1)(*d*)	Application for a license or permission to effect substantial expansion.
4.	EE	7	13(1)(*a*)	Application for license or permission to carry on business after the expiry of the period prescribed for registration.
5.	EE	7	13(1)(*b*)	Application for license or permission to carry on business after revocation of registration under Section 10A.

6.	EE	7	13(1)(*c*)	Application for license or permission to carry on business after the expiry of three months from the date on which the provisions of the Act became applicable.
7.	EE	7	10, 11, 13, (1)(*d*) read with 29B	Application for license or permission to carry on business after the expiry of the period as may be specified in the Notification cancelling the exemption.
8.	E	7	13(1)(*e*)	Application for license or permission to change the location of the whole or any part of the undertaking.

NOTES :—

(*a*) For specimen forms IL and E, please see the book by Shanbhogue and Das Gupta.

(*b*) Form EE (given under the Rules) has not been completed as it is not normally required.

1. *For a license or permission for the establishment of a new undertaking* (*Section 11*) : (*a*) Applicant : Promoters. (*b*) *Form* : Form IL (with 10 spare copies). (*c*) Enclosures : (*i*) Statement showing requirements of Transport. (*ii*) Statement showing fuel requirements. (*iii*) Draft of the foreign collaboration agreement (if any). (*iv*) Treasury challan duly receipted for the payable fee. (*d*) *Guidelines* : (*i*) Industrial undertaking means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including the Government. (*ii*) The application has to be made before taking any of the following steps, *viz.*, raising from the public any part of the capital required for the undertaking ; commencing the construction of any part of the factory building for the undertaking ; placing an order for any part of the plant or machinery required for the undertaking. (*iii*) Annual capacity has to be estimated on the basis of maximum utilization of plant and machinery. (*iv*) CIF value is required to be given for imported raw materials and components. (*v*) Original value of land, buildings, plant and machinery should be furnished ; in case of land and/or building on rent, capitalised value thereof has to be furnished. (*vi*) While computing the percentage of value of imported raw materials required annually in relation to estimate ex-factory value of production, exclusion should be made of value of imported steel and aluminium. If any variations take place in the wake of the phasing of the manufacturing programme, these may also be indicated.

(*vii*) In indicating present licenced capacity, the basis of licenced capacity should also be clearly mentioned, *e.g.*, whether continuous or by shifts.

2. *For a licence or permission for manufacture of new articles* (*Section 11A*): (*a*) Applicant: Company (or industrial undertaking). (*b*) *Form*: Form IL (with 10 spare copies). (*c*) *Enclosures*: Same as shown in 1 above. (*d*) *Guidelines*: (*i*) The expression "new articles" in relation to an industrial undertaking (which is registered or in respect of which a licence or permission has been issued) means: any article which falls under an Item in the First Schedule to the Act (other than the item under which articles ordinarily manufactured or produced in the industrial undertaking at the date of registration or issue of the licence or permission, as the case may be, fall); any article which bears a mark as defined in the Trade Marks Act or which is subject of a patent (if at the date of registration or issue of the licence or permission, as the case may be, the industrial undertaking was not manufacturing or producing such article bearing that mark or which is the subject of that patent). (*ii*) to (*vi*) are the same as contained in (*iii*) to (*vii*) mentioned in 1 above.

3. *For a licence or permission to effect substantial expansion* [*Section 13*(*1*)(*d*)]: *Applicant, Form, Enclosures*: Same as mentioned in 1 above. *Guidelines*: (*i*) Substantial expansion means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking or which is of such a nature as to amount virtually to a new industrial undertaking but does not include any such expansion as is normal to the undertaking having regard to its nature and circumstances relating to such expansion. (*ii*) to (*vi*) are the same as contained in (*iii*) to (*vii*) mentioned to 1 above. (*vii*) Increase up to 25% of the capacity licenced or registered can be done without obtaining a substantial expansion licence subject to the following conditions, *viz.*, (A) no additional plant or machinery is installed, except minor balancing equipment procured indigenously; (B) no additional expenditure of foreign exchange is involved; and (C) the extra production does not occasion any additional demand for scarce raw materials.

4. *For licence or permission to carry on business after revocation of Registration under Section 10 A* [*Section 13*(*1*)(*b*)]: (*a*) *Applicant*: Company or industrial undertaking. (*b*) *Form*: Form EE (with 10 spare copies). (*c*) *Enclosures*: (*i*) A copy of the last 3 years' balance sheets and profit and loss accounts; (*ii*) A copy of the collaboration agreement (if any); (*iii*) Treasury challan duly receipted for the payable fee. (*d*) *Guidelines*: (*i*) The application is required to be made by an industrial undertaking (the registration in respect of which has been revoked under Section 10A) to carry on business after revocation; (*ii*) Revocation of registration under Section 10A is done in the following circumstances, namely—in case of registration being obtained by misrepresentation as to an essential fact; in case of the undertaking's cessation to be registrable under the Act by reason of

any exemption being inapplicable; in case of registration becoming useless or ineffective for some reason and hence requiring revocation, (*iii*) Unless otherwise indicated, the particulars have to be given as on the date of the application. (*iv*) Against inapplicable particulars, *e.g.*, deferred shares, managing agents, the letters "NA" (*i.e.*, not applicable) should be given. (*v*) While giving Monthly Installed Capacity, number of working days in a month and the number of shifts in a day have to be indicated. (*vi*) In the case of seasonal industries like Sugar, *figures* relating to the season may be given. (*vii*) Against Fixed Assets, the capitalised value of land and/or building should be given if they are rented.

5. *For licence or permission to carry on business after the expiry of the period prescribed for Registration* [*Section 13(1)(a)*]: (*a*) *Applicant, Form and Enclosures* are the same as indicated in 4 above. (*b*) Guidelines: (*i*) The application has to be made by an industrial undertaking required to be registered under Section 10 but which has not been registered within the time stipulated in the Section for this purpose, if it proposes to carry on business after the expiry of such period. (*ii*) to (*vi*) are the same as (*iii*) to (*vii*) mentioned in 4 above.

6. *For licence or permission to carry on business after the expiry of 3 months from the date on which the provisions of the Act became applicable* [*Section 13(1)(c)*]: (*a*) *Applicant, Form, Enclosures* are the same as mentioned in 4 above. (*b*) *Guidelines*: (*i*) The application is required to be made by an undertaking to which the provisions of the Act did not originally apply but which became applicable after the commencement of the Act for any reason, if it carries on business after the expiry of 3 months from the date on which the provisions of the Act became applicable. (*ii*) to (*vi*) are the same as (*iii*) to (*vii*) mentioned in paragraph 4 above.

7. *For licence or permission to carry on business after the expiry of the period as may be specified in the notification cancelling the Exemption*: (*a*) *Applicant, Form* and *Enclosures* are the same as mentioned in paragraph 4 above. (*b*) *Guidelines*: (*i*) Where an Exemption Order issued under Section 29B has been cancelled and the industrial undertaking thereafter proposes to carry on business after the period to be specified, the application must be made by the industrial undertaking if any of the following Sections, *viz.*, S. 10, S. 11, S. 11A, S. 13(1)(*d*), applies. (*ii*) to (*vi*) are the same as (*iii*) to (*vii*) mentioned in paragraph 4 above.

8. *For licence or permission to charge the location of the whole or any part of the undertaking* [*Section 13(1)(e)*]: (*a*) Applicant: Company or industrial undertaking. (*b*) *Form*: Form E (with 10 spare copies). (*c*) *Enclosure*: Treasury challan duly receipted for the prescribed fee. (*d*) *Guidelines*: (*i*) The application should be made if the company proposes to change the location. (*ii*) Shifting of part of the machinery to set up a separate unit elsewhere will amount to change of location of a part of the undertaking.

GENERAL GUIDELINES ISSUED BY GOVT.

A. *Guidelines for filling IL Application* : (*i*) To use only prescribed application from (with 10 spare copies). [New undertakings, New articles or Substantial expansion-IL Form ; COB (carrying on business) Licence-EE Form ; Change of Location-E Form]. (*ii*) To use separate application forms, if the proposed items of manufacture fall under more than one entry in the First Schedule to the Industries (Development and Regulation) Act. (*iii*) To give all necessary information in the application form itself. Particulars mentioned in a covering letter may not be taken into account. (*iv*) To give all answers in words and/or figures in Form completely avoiding "dots" and "dashes". (*v*) To clearly indicate the actual type of application, *i.e.*, whether for new undertaking, for substantial expansion, for new articles, for COB licence or for change of location. (*vi*) To duly sign the application form and to clearly indicate the designation/capacity of the signatory. (*vii*) To annex to the Form a treasury challan for Rs. 500 deposited under the head of account "210-Industries—A. General Licence Fees". (*viii*) To give names and addresses of the directors on the Board of companies in respect of existing companies as well as companies proposed to be formed. (*ix*) To indicate the precise location of the project; not to propose alternative locations in more than one State. If it is proposed to locate project in a Backward Area/District, this should be specifically mentioned. (*x*) To give the proposed investment in fixed assets (land, building and machinery) in regard to applications for New Undertakings ; to disclose the existing fixed assets in cases involving Substantial Expansion or the manufacture of New Articles. Applications will not be considered without complete information on amounts of investment. (*xi*) To properly fill up the column provided for employment (existing or proposed). (*xii*) To disclose percentage of foreign equity in cases of applicant-companies with foreign shareholding direct or indirect.

B. Cases Covered by MRTP Act : In the case of undertakings registered under the MRTP Act, IL application should invariably be accompanied by either (*i*) 3 copies of the corresponding application/notice under the MRTP Act (a full set of such applications being directly filled with the Dept. of Company Affairs simultaneously), or (*ii*) 3 copies of a letter from the applicant-undertaking (addressed to the Department of Company Affairs) seeking exemption from the operation of the MRTP Act on the merits of the proposal.

In cases of undertakings *not registered under the MRTP Act* but to whom *show-cause notices* have been issued *under the Act* by the Department of Company Affairs, the particulars with the date of such notices should be mentioned in the appropriate column. In such cases, unless advised to do so, it is not necessary to file the corresponding application/notice as required under the MRTP Act.

In cases of undertakings *already registered* under the MRTP Act, but seeking *de-registration* under the Act, the formal application/notice under the MRTP Act should be filed and 3 copies of it forwarded with the IL application as required in

the case of a registered undertaking not seeking exemption under the MRTP Act on the merit of the proposal. [Here also a full set of application/notice under the MRTP Act should be filed directly with the Department of Company Affairs, as prescribed].

C. Guidelines for conversion of LI into IL: The Ministry has advised entrepreneurs seeking conversion of LI (Letter of Intent) into IL (Industrial Licence) to proceed as follows, namely: (*i*) To send letters confirming acceptance of the conditions laid down in the LI to the SIA (L-II Section) Udyog Bhavan, New Delhi within one ONE month of the receipt of LI. (*ii*) To obtain foreign collaboration approval of Capital Goods Clearance as may be required. (*iii*) To execute, in cases involving export obligations, an Export Bond with the CCI & E, New Delhi or other appropriate authority in the manner prescribed and to send intimation thereof, enclosing a copy of the CCI & E's final acceptance of the Bond, to the LA II Section, S I.A. (*iv*) To send, in cases involving export obligation and the import of capital goods, a copy of the written undertaking (furnished to the CCI & E and the Administrative Ministry) to the LAII Section; to execute a written undertaking to the effect that an agreement/bond (as may be prescribed by the CCI & E) at the time of the Capital Goods imports materialising or at any other time when called upon todo so by the Government—this undertaking serving the purpose. (*v*) To forward to the LA II Section, in a case of doubt from the MRTP angle (in which the letter of Intent [*i.e.*, IL] has been issued subject to the party obtaining clearance under the Act) a photostat copy, wherever required, of the exemption letter or an order of the Central Govt. passed under the MRTP Act, as the case may be, issued by the DCA.

The above-mentioned formalities and such other conditions as may have been prescribed in the LI being complied with, the entrepreneur is to send direct to the LA-II Section of the Secretariat of Industrial Approvals (SIA) in the Ministry of Industry and Civil Supplies a formal letter requesting conversion and enclosing with the letter the papers mentioned above. Normally Industrial Licences (IL) will be issued within 60 days from the date of receipt of the letter of request for conversion, with complete details.

Report to be submitted to the Board of Directors on the consequences of reservation of two of their manufacturing items for small scale units, etc.: The Notification issued by the Central Government whereby it has included two of the major items, which were being manufactured by our Company, in the List of Items reserved for small-scale units, has given rise to a serious situation needing immediate action Section 29B (1) of the Industries (Development and Regulation) Act, 1951, empowers the Government to do what it has done by means of its aforesaid notification. It may exempt any industrial undertaking from the operation of all or any of the provisions of this Act or any rule or order made thereunder. By virtue of Section 29B (2), where any notification granting any exemption is cancelled,

an industrial undertaking like ours to which the provisions of Section 10, Section 11, Section 11A or Section 13(1)(*d*) would have applied, if the notification granting exemption had not been issued, cannot carry on its business after the expiry of the period specified in the said notification cancelling the exemption, except under and in accordance with a licence issued in this behalf by the Central Government and in accordance with the previous permission of the Central Government. The impact of this is that, for the purpose of carrying on of our business in respect of the aforesaid two major items to which licencing provisions of the Act did not originally apply, a licence would now be necessary. Such a licence is called COB (carrying on of business) licence ; it would be as much necessary as it was when our undertaking was set up anew.

The procedure in this regard is that an application for "carrying on business" (COB) have to be made in Form EE under the Registration and Licencing of Industrial Undertakings Rules, 1952. After the expiry of six months from the date of the Government's notification aforesaid, our Company will be debarred from carrying on business in the two items. Thus, we have five months' time at our disposal to apply for COB licence.

Ten spare copies of the application will have to be forwarded to the Government. Each of these must be accompanied by : (*i*) a copy each of the last three years' balance sheets and profit and loss accounts ; (*ii*) treasury challan duly receipted for the fee payable. As our company has no collaboration agreement, the question of attaching a copy thereof with the application does not arise.

Against fixed assets, the capitalised value of land and/or building need not be given, since they are not rented.

The matter should be seriously taken up with the Government. They should be impressed upon the fact that there is neither legal nor moral justice in reserving the two items for the small-scale units, which were being manufactured by our undertaking for a considerably long time. As a matter of fact our undertaking has come to acquire an expertise in respect of the two items (referred to in the question). These items need precision work involving highest engineering skill for which our undertaking came to wield high reputation not only in the indegenous markets but also in Arab countries, as a result of which our export business got a tremendous boost. To meet this demand, the undertaking which was engaged in some of the 15 specified engineering industries increased their capacity in pursuance of Press Note dated August 21, 1975, issued by the Central Government at the rate of 5% per annum up to a limit of 25% in the Fifth-year Plan Period. It may be mentioned that this automatic growth of capacity was allowed without the necessity to obtain a "substantial expansion" licence under the Industrial (Development and Regulation) Act, because it fulfilled the specified conditions, namely :—(*i*) the product mix

was not in conflict with the items then reserved for small-scale sector; (*ii*) the undertaking took care of its investment-requirements without approaching the financing institutions for any long-term capital loans ; (*iii*) import of capital equipment was not at all involved ; (*iv*) the undertaking was not dominant in the line of manufacture and its capacity utilization was satisfactory ; (*v*) the foreign exchange earnings by way of exports are to the exclusive advantage of the Government of India, since the undertaking has no foreign collaboration.

As a result of the reservation of the two major items for small-scale units, there would be a fall in the volume of exports and a consequential fall in foreign exchange earnings. Secondly, considerable span of time would elapse till the new enterprises for the said two items come up to our standard to face competition in the foreign markets at a future time. Thirdly, we like other medium-sized light engineering units, need, for the purposes of manufacturing our products, innumerable components and accessories the manufacture of which cannot be economically taken up by us or our counter-parts but can be profitably taken up by young, self-employed enterprises in the small-scale units. As a matter of fact, our undertaking has been supporting a large number of small-scale units from whom it is receiving supplies of components and accessories. Further, these small scale units, though large in number, are not capable of coping with our requirements as well as our counterparts' in respect of components and accessories. Therefore, instead of reserving the two major items fos the small scale units or our counterparts which we have been manufacturing, the Government should encourage a greater number of entrepreneurs to set up small-scale units to manufacture the components and accessories which we, along with others, require.

However, the Board may also consider setting up a task force to locate what products can be substituted for the two items, since at the most Government is likely to grant exemption to our Company only for a limited period.

INDUSTRIAL LICENCING POLICY OF THE GOVERNMENT

Licencing Policy : The Industrial Licencing Policy of 1970 imposes certain restrictions on undertakings belonging to the larger industrial houses as defined in the report of the Industrial Licencing Policy Inquiry Committee (abbreviated as ILPIC). Such concerns are ordinarily excluded from taking part in sectors other than the core and heavy investment sectors leaving opportunities in the remaining sectors primarily to other classes of entrepreneurs. The definition of larger industrial houses (as adopted by the ILPIC) was on the basis of assets along with assets of inter-connected undertakings, exceeding Rs. 35 crores. But the Government considers that the definition of large industrial houses to be adopted for licencing restrictions should be in conformity, in all regards, with what adopted in the M.R.T.P. Act.

The definition contained in the said Act is on the basis of the assets of not less than Rs. 20 crores. The adoption of this lower limit and the definition of the inter-connected undertakings as contained in the M.R.T.P. Act will ensure more effective control on the concentration of economic power : it will also remove the contradiction between the definition of larger industrial houses for licencing purposes (which is based on ILPIC report) and for the control of concentration of economic power (which is based on the M.R.T.P. Act).

In the context of approach to the 5th Plan, the core industries of importance to the national economy in the future, industries having direct linkages with such core industries, and industries with a long-term export potential are all of basic, critical and strategic importance for the growth of the economy. Larger houses will be entitled to take part in and contribute to the establishment of industries in the list included in Appendix I (given at the end) along with other applicants, if the item of manufacture is not one which is reserved for production in the pubiic sector or in the small-scale sector. Ordinarily, they will be excluded from the industries not included in this list, except where production is predominantly for exports.

Similarly, foreign concerns and subsidiaries and branches of foreign companies will be entitled to participate in the industries mentioned in Appendix I along with other applicants ; but ordinarily they will be able to excluded from the industries not included in this list. They will be invest in industries if production is predominantly for exports. Their investments will be subject to the guidelines on the dilution of foreign equity and will be examined with reference to technological aspects, export possibilities and other overall effect on the balance of payments.

Small-scale and co-operative sectors : Licencing decisions shall conform to the growth profile of the Plan and techno-economic and social considerations, *e.g.*, economies of scale, appropriate technology, balanced regional development and development of backward areas, shall be fully replaced. The Government's policy is to encourage competent small and medium entrepreneurs in all industries including those listed in Appendix I. In setting up of new capacity, such entrepreneurs will be preferred to large industrial houses and foreign companies, Licencing, policy will seek to promote production of ancillaries, wherever feasible and appropriate, in the medium or small-scale sector. Co-operatives and small and medium entrepreneurs will be encouraged to participate in the production of mass consumption goods with public sector also taking an increasing role.

The limit of exemption from licencing provision will apply to substantial expansion and new undertakings up to Rs. 1 crore by way of fixed assets in land, buildings and machinery. This exemption will be inapplicable to larger industrial

houses and to "dominant undertakings" as defined by the M.R.T.P. Act and to foreign companies and their branches and subsidiaries. The Government has also decided that the exemption would be inapplicable to existing licenced or registered undertakings having fixed assets exceeding Rs. 5 crores which will hereafter be subject to the licencing provisions of the Industries (Development & Regulation) Act in respect of new undertakings and expansion and diversification in the delicenced sector.

The policy of reservation for the small-scale sector which involves investment in machinery and equipment up to Rs. 7.5 lakhs and in the case of ancillary industries up to Rs. 10 lakhs continues. The policy of encouragement to the cooperative sector will receive special emphasis in industries which process agricultural raw materials, *e.g*, sugar cane, jute, cotton, or produce agricultural inputs such as fertilizers.

The policy of the Government pertaining to joint sector is derivative of the Industrial Policy Resolution 1956. The Central and State Governments have taken equity participation with private parties, in appropriate cases. Each proposal for establishing a joint sector unit is judged and decided on its merit, commensurate with the Government's social and economic objectives. The joint secctor will not be permitted to be used for the entry of larger houses, dominant undertakings and foreign companies in industries in which they are otherwise precluded on their own.

This policy has been further liberalised, as far as the large houses and dominant undertakings are concerned, by a number of subsequent policy announcements made by the Central Government, e.g., the Press Note dated 21st August, 1975 allowing industrial undertakings in 15 specified engineering industries automatic growth of capacity at the rate of 5% per annum and up to a limit of 25% in a Plan period subject to certain conditions ; a Press Note dated 21st October, 1975 delicencing 21 specified industries provided the undertaking is not covered by the M.R.T.P. Act or the Foreign Exchange Regulation Act and provided no import of raw materials, imported capital goods or foreign collaboration are required, and also allowing unlimited expansion of capacity · in 29 specified industries on the basis of full utilisation of capacity, this facility being available also to undertakings covered by the M.R.T.P. Act and the F.E.R.A. subject to the condition that the excess production is exported or sold in accordance with the directions of the Government ; and the Press Note dated 4th November, 1975 providing for a simplified procedure by which companies covered by the M.R.T.P. Act can take advantage of the facility of increasing production by utilising installed capacity allowed by the earlier notification dated 21st October, 1975. For details see Guidelines for Industries 1976-77 published by the Government of India, Ministry of Industry & Civil Supplies. Also, see F.S.P. (N) Eco –9.

Streamlining of Industrial Approval Procedure

The primary objective of the Government's decision on industrial Policy (vide Press Note dated February 2, 1973) is to issue various clearances within definite time targets. Letters of intent, foreign collaboration approvals and capital goods clearances are proposed to be issued within 90 days of the receipt of applications in each case, in the M.R.T.P. cases, within 150 days having regard to the provisions of the Act. Entrepreneurs are intended to be encouraged to come for ward with composite applications for industrial licence, foreign collaboration approval and capital goods clearance. In such composite cases, the time target will be 120 days for a composite clearance; in addition, in the event of an M.R.T.P. clearance being involved, the time target will be 150 days.

The implementation of the declared system of Industrial Approvals has been placed under the supervision and guidance of an Inter-Ministerial Committee of Secretaries (namely Project Approval Board=PAB). The composite applications are to be directly dealt with by the PAB. A joint licencing-cum-M.R.T.P. Advisory Committee has been formed; its function is to facilitate the co-ordinated and timely disposal of licencing and M.R.T.P. clearance.

The PAB and other approval Committee are to be serviced by a Secretariat for Industrial Approvals (abbreviated as SIA).

All applications for industrial licence and foreign collaboration may be submitted to SIA (Central Receipts and Despatch Section), Udyog Bhavan, New Delhi Capital Goods Applications—where the estimated value of equipment is Rs. 10 lakh (non-rupee area) and Rs. 20 lakh (rupee area) or above—may be submitted to the SIA (C.G. Unit) Such appplications below these limits may continue to be submitted to the Chief Controller of Imports and Exports. Foreign Collaboration agreements which have to be taken on record by the Government after their conclusion may be sent to the Administrative Ministry concerned.

It will be necessary for applicants who need a clearance under the M.R.T.P. *Act to submit industrial licence and the M.R.T.P.* applications simultaneously in future; only then it will be feasible to co-ordinate the two clearances within the prescribed time-limits under the new arrangements. In such cases, a copy of the M.R.T.P. application should be sent to the SIA (Central Receipts and Despatch Section), along with the industrial licence application. Simultaneously, the prescribed number of copies of the M.R.T.P. application should be sent to the Department of Company Affairs. If the applicant needs pital goods clearance and/or foreign collaboration approval in addition to an industrial licence, he may submit simultaneous applications for all the approvals required Entrepreneurs are advised to submit such "composite applications" inasmuch as it will enable a composite or simultaneous clearance to be given with a significant saving in the time-lag. They

are also advised to submit sufficient number of additional copies of applications where investment proposal involves the manufacture of items which fall under different sub-groups listed in the first Schedule to the Industries (Development & Regulation) Act; thereby speedy processing will be facilitated. The help of the Entrepreneurial Assistance unit of the SIA will be available to the applicants in filling the requisite forms.

The Government has decided that in future the initial validity period for a letter of intent will be 12 months. In cases where neither foreign collaboration approval nor capital goods clearance is involved, an industrial licence will be issued at the initial stage itself instead of a letter of intent. In cases where only one further clearance (e.g. foreign collaboration or capital goods clearance) is needed, one further extension of 6 months to the initial validity may be considered. But where both (mentioned within brackets above) are involved, two extensions of six months, each beyond the initial validity period of 12 months may be considered. Applications for extensions to letters of intent should be addressed to the Administrative Ministry concerned. In the event of the entrepreneur's failure to file applications of clearances he needs within the total periods of 18 to 24 months, his letter of intent will lapse; he will have to apply for a fresh one.

The letters of intent will be automatically converted in future into industrial licences when the final subsequent clearance that is required (*e.g.*, foreign collaboration or capital goods clearance) is given. Applications for converting letters of intent issued before November 1, 1973 into industrial licences may be sent with a copy of the original approval to the Administrative Ministry concerned.

The initial validity of industrial licences will be for 2 years. Within this period, commercial production from the licenced capacity will have to be established. However, the Administrative Ministry concerned can extend this period by two further periods of one year each. But the extension beyond these periods will be decided by the PAB.

Entrepreneurs who hold industrial licences shall submit returns in Form G prescribed under Rule 14 of the Registration and Licencing of Industrial Undertakings Rule, 1952. These returns are to be submitted within one month after the expiry of every half year ending on June 30 and December 31 commencing from the date of issue of licence, until the production is started. These returns are to be submitted in duplicate to SIA (Monitoring Unit). Copies of Form G returns should also be sent to the Administrative Ministry concerned and to Director General of Technical Development or other appropriate technical authority.

Appendix I to the Industrial Licencing policy 1973.

The classification of industries follows the First Schedule to the Industries (Development and Regulation) Act, 1951. Items of manufacture reserved for the

public sector under Schedule A to the Industrial Policy Resolution, 1956 or for production in the small scale sector as may be notified from time to time will be excluded from the application of the list).

1. Metallurgical Industries.
   (1) Ferro Alloys
   (2) Steel Castings and Forgings
   (3) Special Steels
   (4) Non-ferrous Metals and their alloys.
2. Boilers and Steam Generating Plans.
3. Prime Movers (other than Electrical Generators)
   (1) Industrial Turbines
   (2) Internal Combustions Engineers
4. lectrical Equipment
   Equipment for transmission and distribution of electricity
   (2) Electrical Motors
   (3) Electrical Furnaces
   (4) X-ray Equipment
   (5) ectronic Components and Equipment
5. Tran tation.
   (1) anised sailing vessels upto 1000 DWT
   (2) S ncillaries
   (3) Co rcial Vehicles
6. Industri chinery
7. Machine
8. Agricultur chinery ; Tractors and Power Tillers
9. Earthmovin chinery
10. Industrial In nts : indicating, recording, and regulating devices for pressure, tem re, rate of flow, weights, levels and the like.
11. Scientific Instr
12. Nitrogenous a osphatic fertilisers falling under (1) Inorganic fertilisers under ertilisers in the First Schedule to the I D & R Act, 1951.

13. Chemicals (other than Fertilisers)
    (1) Inorganic Heavy Chemicals
    (2) Organic Heavy Chemicals
    (3) Fine Chemicals, including photographic chemicals
    (4) Synthetic Resins and Plastics
    (5) Synthetic Rubbers
    (6) Man-made fibres
    (7) Industrial Explosives
    (8) Insecticides, fungicide, weedicides and the like
    (9) Synthetic Detergents
    (10) Miscellaneous Chemicals (for industrial use only)
14. Drugs and Pharmaceuticals.
15. Paper and Pulp including Paper products.
16. Automobile Tyres and Tubes.
17. Plate Glass
18. Ceramics
    (1) Refractories
    (2) Furnance lining bricks-acidic, basic and neutral
19. Cement Products
    (1) Portland Cement
    (2) Asbestos Cement

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